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Supreme Court, U.S.
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No. ____________

IN THE
Supreme Court of the United States

D.L., INDIVIDUALLY, AS THE NEXT FRIEND OF J.L. AND AS THE ADMINISTRIX OF THE ESTATE OF R.L.; AND P.P.

Petitioners,

v.

UNIFIED SCHOOL DISTRICT NO. 497, DOUGLAS COUNTY, KANSAS AND DR. DOUGLAS EICHER,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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March 28, 2005

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QUESTIONS PRESENTED

Contrary to the express language of the Individuals with Disabilities in Education Act, 20 U.S.C. §§ 1400-1485 ("IDEA"), it is now the law in the Tenth Circuit that a public school district can refuse to provide notice of parental rights (as required by 20 U.S.C. § 1415(b)(3)) and can refuse to provide a due process hearing (as required by 20 U.S.C. § 1415(f)) without violating IDEA. Accordingly, the question presented in this petition for writ of certiorari is:

A. Are the failure of an educational agency to provide notice of parental rights and the outright refusal of an educational agency to provide a requested due process hearing actionable violations of IDEA?

LIST OF PARTIES

The parties below are listed in the caption.

CORPORATE DISCLOSURE STATEMENT

None of the parties to this litigation are corporations. Respondent (defendant below) Unified School District No. 497, Douglas County, Kansas is a local governmental entity and educational agency duly authorized and existing under the laws of the State of Kansas.

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PETITION FOR WRIT OF CERTIORARI

Petitioners (plaintiffs below) respectfully petition for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is published at 392 F.3d 1223 (10th Cir. 2004). See Appendix A. The Tenth Circuit affirmed in part and vacated in part the unpublished decision of the United States District Court for the District of Kansas entered on July 25, 2003, and the decision of that same District Court published at 270 F.Supp.2d 1217 (D.Kan. 2002), as amended by the District Court's unpublished October 1, 2002, and October 4, 2002 orders. See Appendices B-E.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The Tenth Circuit's opinion was rendered on December 27, 2004.

RELEVANT STATUTORY PROVISIONS

The statute at issue in this petition is the Individual with Disabilities in Education Act, 20 U.S.C. §§ 1400-1485 ("IDEA"). Specifically, the provision of IDEA which is at issue is 20 U.S.C. § 1415 "Procedural Safeguards". Because of its length, this provision is set out in Appendix F pursuant to Supreme Court Rule 14.1(f).

STATEMENT OF THE CASE

- This petition involves claims under IDEA based on the respondent school district's failure to provide petitioners with notice of parental rights and a due process hearing as required by IDEA or otherwise to provide them with a free appropriate public education.[1] Specifically, during the relevant time period, R.L. and J.L. were children with disabilities under IDEA residing in the State of Kansas. Beginning with the 1997-98 school year, R.L. and J.L. were enrolled in the respondent school district which accepted state and federal funds for the provision of educational services to these two students.[2]

During the fall of the 1999-2000 school year, the school district conducted a surreptitious investigation concerning the living arrangements of R.L. and J.L. and unilaterally concluded that they were not residents of the respondent school district and were instead residents of another Kansas school district. The respondent school district never contacted R.L. and J.L.'s parents regarding questions it had concerning the children's residence.[3]

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[1] Petitioners also asserted claims below based on Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §§ 794 *et seq.*, the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.* and the Due Process and Equal Protection Clauses of the 14th Amendment to the U.S. Constitution pursuant to 42 U.S.C. § 1983. The Tenth Circuit found that it and the district court were without jurisdiction to hear these other claims based on the doctrine enunciated by this Court in Younger v. Harris, 401 U.S. 37, 54 (1971).

[2] See K.S.A. 72-966(a)(2) ("[e]ach board shall provide a free appropriate public education for exceptional children **enrolled in** the school district … ." (emphasis added)).

[3] Had the respondent school district simply contacted D.L., the children's mother, it would have learned that she and the children kept two residences in the State of Kansas: (1) an apartment within the respondent school district; and (2) a house in the other school district. She kept the residence in the respondent school district

Instead, the school district's attorney sent a letter to D.L. (the children's mother) and P.P. (her boyfriend who assisted in the care of the children and with whom D.L., R.L. and J.L. resided) stating that:

> The District has determined through an investigation that your children, [R.L.] and [J.L.], are attending schools in the District although you are not residents of the District. Your children's attendance in the District's schools therefore violates Kansas law.
>
> The District therefore demands that you immediately withdraw [R.L.] and [J.L.] from the District, and enroll them either in the school district in which you reside, or in a private school of your choosing. We will take legal action to enjoin the attendance of [R.L.] and [J.L.] if you do not comply with this demand.

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because it was close to the University of Kansas where R.L. received various services in connection with his autism and kept the other residence so that her parents could care for her children during the night while she worked as a delivery person for the K.C. Star newspaper. During the day while the children were in school, D.L. slept in the apartment located within the respondent school district. Because the respondent school district had already reported R.L. and J.L. as enrolled students to the State of Kansas and accepted state and federal monies for the provision of educational services to these children for the 1999-2000 school year, their residency was not material to the respondent school district's obligation under IDEA to provide services to these children. As a state receiving funds under IDEA, Kansas must assure that all children with disabilities residing in the state have the right to a free appropriate public education. 20 U.S.C. §1412(a)(1)(A). Likewise, as a local educational agency receiving funds under IDEA, the respondent school district must also assure that all students enrolled therein receive a free appropriate public education. 20 U.S.C. §1413(a)(1); K.S.A. 72-966(a)(2).

The school district's Director of Instruction and Curriculum, Dr. Douglas Eicher, sent a follow-up letter to D.L. and P.P. on January 4, 2000, stating:

> This is to inform you that January 13, the end of the first semester, will be the last day for your sons to attend Lawrence Public Schools. Since you do not reside in this district, your children's attendance in the District violates the Kansas law and legal action will be taken if you do not comply with this letter. Thank you very much for your attention in this matter.

Dr. Eicher sent yet another missive to D.L. and P.P. on January 13, 2000, wherein he stated:

> We understand that despite prior notice to you, you may intend to bring your children to the Lawrence Public Schools for the commencement of the second semester. This is to notify you of the following:
>
> 1. That your sons will receive no educational services from the Lawrence Public Schools as long as they are not eligible for such services.
>
> 2. That you are not authorized to enter upon any premises of the Lawrence Public Schools, and if you do so, you may expect to be subject to prosecution for criminal trespass pursuant to K.S.A. 21-3721.

Having thus been advised that the school district would not provide educational services to her children even though it had received federal and state funding for the provision of those services and refused to allow her or her children on the school district's property, D.L. met with an attorney who contacted the school district's attorney in an attempt to resolve the situation. The school district's attorney advised that, if the children were sent to school, security personnel would be sent to their classrooms to remove them. Accordingly, on January 12, 2000, D.L.'s attorney submitted a written request to the school district for a due process hearing regarding the school district's unilateral decision to stop providing educational services to R.L. and J.L. The school district refused to provide the requested due process hearing.

As a result, R.L. and J.L. were effectively expelled from school until January 24, 2000, when D.L. agreed to execute an "affidavit of residency" prepared by the school district which affidavit required her to certify that R.L. resided with her on a "full-time basis" at the apartment located within the boundaries of the school district. Shortly thereafter, the school district began anew its surreptitious surveillance of D.L., P.P. and the children and again erroneously concluded that the children were not residents of the school district.[4] On April 18, 2000, the school district filed a lawsuit in state court against D.L. and P.P. alleging fraud against them based on the affidavit D.L. had been required to sign and impermissibly seeking as damages the estimated costs of educating R.L. and J.L.[5]

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[4] The school district's investigator merely followed D.L., P.P. and the children in the morning from the house outside the school district to the school. The investigator did **not** follow D.L. and P.P. after the children were dropped off at school. Had he done so, he would have learned that they went to the apartment located within the respondent school district where they slept while the children were attending school.

[5] R.L. and J.L. were not parties to this lawsuit when it was filed and have not yet been added to the same although the school

D.L., R.L., J.L. and P.P. then filed the instant action in federal court challenging the actions of the school district under IDEA and other federal statutes and seeking, *inter alia*, declaratory relief, injunctive relief and damages.[6] In spite of the school district's clear violations of the express language of IDEA regarding notice of parental rights and provision of due process hearings, both the district court and the Tenth Circuit concluded that petitioners could not maintain a viable action under IDEA.

REASONS WHY THE WRIT SHOULD BE GRANTED

IDEA's statement of purpose recognizes that the goal of the statute is "to ensure that the rights of children with disabilities and parents of such children are protected." 20 U.S.C. § 1400(d)(1)(b). Included in the rights created by IDEA for children with disabilities and their parents are the right to parental notice of any proposed change in the provision of a free appropriate education to the child and the right to an impartial due process hearing. 20 U.S.C. § 1415(b)(3), (b)(6) & (f). This Court recognized the importance of these rights in its decision in Board of Education of Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 205-06 (1982). See Havens Realty Corp. v. Coleman, 455 U.S. 363, 373 (1982) (Congress may create a statutory right the alleged violation of which constitutes injury in fact).

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district was granted leave to do so. This lawsuit remains pending in that court and the school district continues to seek to recover, as damages for alleged fraud, the "estimated" costs of R.L. and J.L.'s education.

[6] Again with respect to respondent's non-IDEA claims, the Tenth Circuit found that it, and the district court, were without jurisdiction to hear these other claims based on the doctrine enunciated by this Court in Younger v. Harris, 401 U.S. 37, 54 (1971).

See also Heldman v. Sobol, 962 F.2d 148, 154-57 (2nd Cir. 1992) ("IDEA's procedural guarantees, however, serve not only to guarantee the substantive rights accorded by the Act; the procedural rights, in and of themselves, form the substance of IDEA … The central role of the IDEA process rights bears witness that Congress intended to create procedural rights the violation of which would constitute injury in fact"). The Tenth Circuit's decision in this case renders these important procedural protections afforded by Congress to children with disabilities and their parents ineffective and completely thwarts the very purpose of IDEA. School districts will be able to neglect to give notice of parental rights and to ignore requests for due process hearings with impunity. This can not, is not and should not be the law. The Tenth Circuit's opinion that the failure to provide notice of parental rights and the outright refusal to provide a requested due process hearing are not actionable violations of the IDEA is contrary to the law and sets a dangerous precedent that should be reviewed by this Court.

A. The failure of an educational agency to provide notice of parental rights and the outright refusal to provide a requested due process hearing are actionable violations of IDEA. There is no dispute in this case that the educations of R.L. and J.L. were governed by I.E.P.'s created pursuant to the IDEA. There is no dispute that the school district sought unilaterally to make changes in the provision of a free appropriate education to R.L. and J.L. and expelled them from school. There is no dispute that D.L. and P.P. were not provided with written prior notice of the school district's actions as required by 20 U.S.C. § 1415(b)(3), (c) & (d). There is no dispute that, in spite of the fact that they had not been provided with proper notice, petitioners requested a due process hearing as guaranteed to them by

20 U.S.C. § 1415(b)(6), (f) & (h). There is no dispute that the school district refused to provide petitioners with a due process hearing in direct violation of 20 U.S.C. § 1415(f). Finally, there is no dispute that, as a result of the actions of the school district, R.L. and J.L. were excluded from school for a period of time and, after their return to school, their parents were subjected to a state court proceeding which sought impermissibly to recover the costs of the students' "free" education under the auspices of a common law fraud claim. None of this would have occurred had the school district simply followed the express requirements of IDEA and provided petitioners with the requested due process hearing.

Having been deprived of the rights expressly conferred upon them by IDEA, petitioners sought redress against the school district in federal court. The district court, relying on the Tenth Circuit's decision in T.S. v. Ind.Sch.Dist. No. 54, 265 F.3d 1090, 1093 (10th Cir. 2001) cert. denied 535 U.S. 927 (2002), ultimately concluded that the school district's violations of IDEA were not actionable because the violations were merely "procedural" and not "substantive". The Tenth Circuit, also relying on its prior decision in T.S., affirmed the district court's decision holding that the failure to provide parental notification of rights and the refusal to provide a requested due process hearing were not actionable under IDEA.

The Tenth Circuit's decision in this case, as well as its prior decision in T.S., is contrary to the express language and intent of the IDEA.[7] 20 U.S.C. § 1415; see

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[7] The instant case and T.S. are the culmination of a line of cases in the Tenth Circuit which have addressed whether technical deviations from the requirements of IDEA automatically result in a viable cause of action under the IDEA. See Urban v. Jefferson Cy. Sch. Dist. R-1, 89 F.3d 720 (10th Cir. 1996); O'Toole v. Olathe Dist.

Rowley, 458 U.S. at 205-06; see also Bitsilly *ex rel.* Denet-Yazzie v. Bureau of Indian Affairs, 253 F.Supp.2d 1257, 1263 (D.N.M. 2003) ("the complete denial of due process hearings" is a substantive denial of a free appropriate public education); Blackman v. District of Columbia, 277 F.Supp.2d 71, 78-82 (D.D.C. 2003) (failure to provide timely due process hearing and determinations can itself constitute the denial of a free appropriate education); Walker v. District of Columbia, 157 F.Supp.2d 11, 31-32 (D.D.C. 2001); Evans v. Board of Education of the Rhinebeck Central School District, 930 F.Supp. 83, 93 (S.D.N.Y. 1996) ("A violation of the [IDEA's] procedural guarantees may be a sufficient ground for holding that a school system has failed to provide a free appropriate public education and thus has violated the [IDEA]."); Heldman v. Sobol, 962 F.2d at 154-57; Monahan v. Nebraska, 491 F.Supp. 1074, 1086 (D.Neb. 1980), aff'd in part, vacated in part, 645 F.2d 592 (8th Cir. 1981) cert. denied sub nom. Rose v. Nebraska, 460 U.S. 1012 (1983); see also Jackson v. Franklin County School Bd., 806 F.2d 623, 628-29 (5th Cir. 1986) (school's failure to provide notice and convene IEP conference was *per se* violation of IDEA's predecessor statute); Hall v. Vance County Board of Education, 774 F.2d 629, 635 (4th Cir. 1985) (failure to meet Act's procedural requirements are "adequate grounds by themselves" for holding that the school failed to provide a free appropriate public education as required

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Sch. No. 233, 144 F.3d 692 (10th Cir. 1998); Erickson v. Albuquerque Pub. Sch., 199 F.3d 1116 (10th Cir. 1999). However, these prior decisions dealt with matters that can fairly be described as mere technical deviations or irregularities, such as whether the "descriptions" of the goals and objectives, related services and present levels of functioning contained in the student's IEP's complied with the statutory requirements for an IEP, rather than a complete failure to provide notice of parental rights or the outright refusal to provide a requested due process hearing.

by the Act). Contrary to the conclusion of the Tenth Circuit, the failure to provide notice of parental rights and the outright refusal to provide a requested due process hearing crosses the line from process to substance. See Amanda J. v. Clark County Sch. Dist., 267 F.3d 877, 890-92 & 895 (9th Cir. 2001) (recognizing that "[p]rocedural violations that interfere with parental participation in the IEP formulation process undermine the very essence of the IDEA" and declining to require further proof of a "substantive" violation); W.G. v. Bd. of Trustees, 960 F.2d 1479, 1485 (9th Cir. 1992); M.L. v. Federal Way School Dist., 394 F.3d 634, 644-45 (9th Cir. 2005).

As noted by the court in Blackman, 277 F.Supp.2d at 79, "[w]here there is a denial of a free appropriate education because no hearing has been held and no determination has been issued, and a proper placement therefore has not been made, there results a *per se* harm to the student ..." and "**each day** a child is denied a free appropriate education by such a procedural dereliction of a school system he or she is harmed yet again." In stark contrast, the Tenth Circuit has now held that the failure to provide parental notice and the outright refusal by a school district to provide a requested due process hearing are mere technical violations of IDEA and are therefore permissible unless plaintiffs can also prove or establish that these violations are "linked with a consequent loss of substantive benefits". D.L. 392 F.3d at 1231 citing Rowley at 1093. None of the "procedural" safeguards of IDEA are more important or more "substantive" than written notice of parental rights and the right to an impartial due process hearing. These safeguards are key to the stated purpose of IDEA – "to ensure that the rights of children with disabilities and parents of such children are protected." 20 U.S.C. § 1400(d)(1)(b). If the failure to provide these safeguards cannot be redressed in court, then the rights of children with disabilities and their parents have no real protection, and Congress' carefully crafted safeguards are without effect.

CONCLUSION

The issue presented in this petition is simple and straight forward. It can not, should not, and is not the law that an educational agency can simply disregard with impunity the express requirements of IDEA to provide notice of parental rights and to provide, when requested, an impartial due process hearing. Yet, this is the exact practice condoned by the Tenth Circuit in its opinion in this case. For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 28, 2005

APPENDIX

APPENDIX A – OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DATED AND DECIDED DECEMBER 27, 2004

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Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

D.L., individually and as next friend of J.L., a minor; ESTATE OF R.L.; and P.P., Plaintiffs – Appellants,	
v.	No. 03-3268
THE UNIFIED SCHOOL DISTRICT NO. 497; DR. DOUGLAS EICHER, School Administrator, individually and in his official capacity, Defendants - Appellees.	

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
(D.C. NO. 00-CV-2439-CM)

Gregory P. Goheen of McAnany, Van Cleve & Phillips, P.A., Kansas City, Kansas, for Plaintiffs - Appellants.

W. Joseph Hatley of Lathrop & Gage, L.C., Overland Park, Kansas, for Defendants - Appellees.

Before **KELLY**, **HENRY**, and **HARTZ**, Circuit Judges.

HARTZ, Circuit Judge.

The suit before us on appeal arises out of a dispute concerning the eligibility of J.L. and R.L. (the children) for special-education services provided by Unified School District No. 497, Douglas County, Kansas (the District). Plaintiffs are J. L; the Estate of R.L., who died after the suit was filed; their mother D.L. (Mother); and her cohabiting boyfriend P.P. Defendants are the District and Dr. Douglas Eicher, its former director of special education.

Before this suit was filed, the District brought a state-court action (which is still pending) to require Mother and P.P. to pay for special-education services provided the children during a period when, according to the District, the children were not residents of the District and therefore were ineligible for those services. Plaintiffs then sued in federal district court, claiming that denial of the special-education services received by the children from the District would have violated the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*; the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.*; the Rehabilitation Act, 29 U.S.C. § 794 *et seq.*; the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g; and the Fourteenth Amendment.

We exercise jurisdiction under 28 U.S.C. § 1291. We affirm the judgment in favor of Defendants on one part of the IDEA claim. As for the other claims before us, we hold that the district court should have stayed proceedings on the claims for damages and lacked jurisdiction to resolve the remaining claims because of the pending state action. *See Younger v. Harris*, 401 U.S. 37, 54 (1971).

I. Background

R.L. was autistic and his brother J.L. suffers from a milder learning disability. In August 1997 Mother enrolled the children in the District. During that school year an anonymous informant told the District that the children were nonresidents. When asked, Mother assured the District that she and the children were residents. In November 1999 an anonymous informant again told the District that the children were nonresidents. The District hired an investigator who discovered that they were being driven from Kansas City, Kansas, outside the District, to Lawrence, Kansas, inside the District, to attend school.

On January 4, 2000, the District wrote Mother saying that the children would not be permitted to return to school after January 13, 2000, the end of the semester. Plaintiffs requested a due-process hearing under the IDEA, but the District denied the request. On January 24, 2000, after negotiations between the District and counsel for Mother, Mother provided an affidavit of residency stating that R.L. was living with her within the District. The children were readmitted that day. In March 2000, however, the District again engaged an investigator who discovered that the children were commuting to school from Kansas City.

The District maintained a nonresident-admission policy under which nonresidents were admitted so long as there was space available in the District's schools. They were not admitted, however, if doing so would require the District to hire additional staff. Because each autistic student was assigned his own paraprofessional (and, apparently, the staff included no extra paraprofessionals for autistic students), autistic students were unable to obtain nonresident admission.

On April 18, 2000, the District sued Mother and P.P. in Kansas state court, seeking damages to compensate it for the cost of educating the children while they were nonresidents and an injunction prohibiting the children from attending District schools in the future. The crux of the suit is whether the children were entitled to the education they received from the District.

On September 29, 2000, Mother, P.P., and the children countered by filing suit in the United States District Court for the District of Kansas against the District, Dr. Eicher, and the members of the District's school board. They alleged that (1) the District violated the IDEA by denying the requested due-process hearing and by expelling the children from January 13 until January 24, 2000, when Mother provided the affidavit of residency; (2) the District violated the ADA, the Rehabilitation Act, and the Fourteenth Amendment by discriminating against Plaintiffs because of the children's residence and disabilities; (3) the District violated the FERPA by disclosing the disabilities of the children in the state-court suit; and (4) the District violated Plaintiffs' common-law right to privacy by placing them under surveillance and making public statements about, among other things, their residency outside the district. Plaintiffs sought a variety of forms of relief: declaratory judgments (on their IDEA, ADA, Rehabilitation Act, and Fourteenth Amendment claims); "compensatory education" for wrongful expulsion of the children (on their IDEA claim); compensatory and punitive damages (on their Rehabilitation Act, ADA, FERPA, and common-law right-to-privacy claims); attorney and expert-witness fees (on their Rehabilitation Act, ADA, and Fourteenth

Amendment claims); an injunction requiring the District to permit J.L. to attend school (on their Rehabilitation Act, ADA, and Fourteenth Amendment claims); an injunction requiring the District to adopt nondiscriminatory policies (on their Rehabilitation Act and ADA claims); and an injunction requiring Defendants "to abide by the statutory requirements of IDEA, specifically including the Procedural Safeguards which protect families from the abuses perpetrated by defendants." Aplt. App. at 6.

The district court dismissed all of P.P.'s claims for lack of standing, dismissed the claims against the school-board members as redundant because of the District's presence as a defendant, held that Plaintiffs had failed to state a claim under the FERPA, *see Gonzaga Univ. v. Doe*, 536 U.S. 273, 287 (2002), and granted summary judgment in favor of Defendants on the ADA, Rehabilitation Act, Fourteenth Amendment, and invasion-of-privacy claims. The court also held that Dr. Eicher enjoyed qualified immunity and granted summary judgment in his favor on all claims. The court tried the IDEA claims on deposition testimony and documentary evidence. It decided that even if there had been a procedural violation, there had been no loss of substantive educational benefits, and held that Plaintiffs hence had no right to recovery.

Plaintiffs appeal the district court's judgment in favor of Defendants on the IDEA claims; the court's grant of summary judgment on the ADA, Rehabilitation Act, and constitutional claims; the court's grant of summary judgment as to Dr. Eicher; and the court's ruling that P.P. lacked standing.

II. *Younger* Abstention

Even when a federal court would otherwise have jurisdiction to hear a claim, the court may be obliged to abstain when a federal-court judgment on the claim would interfere with an ongoing state proceeding implicating important state interests. The classic example of this proposition, generally referred to as the *Younger* doctrine, is a federal suit to enjoin a pending state criminal proceeding. *See Younger*; *J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280 (10th Cir. 1999) (applying *Younger*). But the *Younger* doctrine also can apply to a state-court *civil* proceeding, *see Trainor v. Hernandez*, 431 U.S. 434, 444 (1977) (civil suit by state administrative agency to collect fraudulently obtained welfare benefits), including state-court suits between two private parties, *see Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 10 (1987).

Moreover, although *Younger* involved a request for injunctive relief against the ongoing state proceeding, such relief need not be explicitly sought in federal court. In an opinion issued concurrently with *Younger*, the Supreme Court held that "the same equitable principles relevant to the propriety of an injunction [apply] to . . . a declaratory judgment . . . . [W]here an injunction would be impermissible under these principles, declaratory relief should ordinarily be denied as well." *Samuels v. Mackell*, 401 U.S. 66, 73 (1971). The Court expressed two reasons for treating declaratory relief essentially the same as injunctive relief. First, even though a party seeks only declaratory relief, once a declaratory judgment is obtained, the party may obtain an injunction to enforce the declaratory judgment. *Id.* at 72. If, for example, the court's declaratory judgment states that a statute is unconstitutional, the court may then enjoin a prosecution of the federal plaintiff under the statute. Second, a federal-court declaratory judgment would ordinarily have preclusive effect in the state-court proceeding. *Id.* Once the declaratory judgment is entered, the victorious party could insist in state court that the legal proposition declared in federal court cannot be disputed in the state proceeding. Thus, a state-court prosecution of the federal plaintiff may not be able to proceed under a statute declared unconstitutional in the federal-court proceeding.

These same two reasons apply, of course, regardless of the relief initially sought in the federal-court suit. For example, a plaintiff who seeks only monetary damages could, once a money judgment is obtained, seek the additional relief of an injunction and could argue in state court that the federal judgment has preclusive effect. Accordingly, the *Younger* doctrine extends to federal claims for monetary relief when a judgment for the plaintiff would have preclusive effects on a pending state-court proceeding. *See generally Gilbertson v. Albright*, 381 F.3d 965, 978-80 (9th Cir. 2004) (en banc). The rationale for *Younger* abstention can be satisfied, however, by just staying proceedings on the federal damages claim until the state proceeding is final. *See Quackenbush v. Allstate Ins. Co.*, 517 U.S.706, 730 (1996) ("we have permitted federal courts applying abstention principles in damages actions to enter a stay, but we have not permitted them to dismiss the action altogether); *Gilbertson*, 381 F.3d at 980-82.[1]

Younger abstention is jurisdictional. *See Steel Co. v. Citizens for a Better Env.*, 523 U.S. 83, 100 n.3 (1998) (distinguishing case cited by dissent in support of hypothetical jurisdiction as decided on "*Younger* abstention, which we have treated as jurisdictional"). We address it at the outset because a determination that the district court lacked jurisdiction over a claim moots any other challenge to the claim, including a different jurisdictional challenge. Indeed, we have no power to decide an issue if we lack jurisdiction. *See id.* at 93-102. We may address jurisdictional issues in any order we find convenient. *See Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 585 (1999) (deciding personal as against subject-matter jurisdiction); *Younger*, 401 U.S. at 54 ("Because our holding rests on the absence of the factors necessary . . . to justify federal intervention, we have no occasion to consider whether [the Anti-Injunction Act] . . . would in and of itself be controlling . . . .").

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[1] In *Weitzel v. Dep't of Commerce of Stat of Utah*, 240 F.3d 871, 874-75, 877-78 (10th Cir. 2001), we affirmed the dismissal of a damages claim under the *Younger* doctrine. But that decision has no precedential value with respect to this issue because the opinion did not address whether a stay would be the proper disposition.

III. *Younger* Abstention Applied

We proceed to consider Plaintiffs' claims to determine whether it is appropriate to exercise federal jurisdiction over each. We examine only the claims Plaintiffs continue to assert on appeal; we lack jurisdiction to inquire into judgments not appealed, whether or not jurisdiction was properly exercised below. *See Snell v. Tunnell*, 920 F.2d 673, 676 (10th Cir. 1990). We turn first to Plaintiffs' ADA, Rehabilitation Act, and Fourteenth Amendment claims, and hold that *Younger* abstention is required. We then address Plaintiffs' IDEA claim. We hold that part of this claim is subject to *Younger* abstention and that the remainder was properly rejected by the district court on summary judgment.

A. The ADA, Rehabilitation Act, and Fourteenth Amendment Claims

Plaintiffs contend that the District's nonresident-admission policy violates the ADA and the Rehabilitation

Act by treating disabled nonresident children differently from nonresident children who are not disabled; that denying admission to the children on the basis of residency would be a violation of their Fourteenth Amendment right to travel; that equal-protection principles required the District to admit them as nonresidents; and that the nonresident-admission policy violates due process by denying their "property interest [in the children's] education and . . . fundamental liberty interest in having as many residences as they desire." Aplt. Br. at 24.

The district court lacked jurisdiction over each of these claims. Each claim asserts the entitlement of the children to the education they received from the District. The court could not grant any relief--injunctive, declaratory, or monetary--without concluding that the children were so entitled. If any claim succeeds, then there is no merit to the District's state-court suit, which seeks reimbursement from Mother and P.P. for educational expenses of the children to which they, as nonresidents, were not entitled. Therefore, a resolution favorable to Plaintiffs in this case would foreclose that suit (and might even be enforced by a federal injunction against the suit), an interference with state-court litigation that is impermissible under *Younger*. *See Samuels*, 401 U.S. at 72-73.

Younger abstention is inappropriate when a federal plaintiff cannot pursue its federal contentions in the ongoing state proceeding. *See Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 435-37 (1982). But no reason appears why Plaintiffs' contentions here could not be interposed as defenses in state court. *See Lebbos v. Judges of Superior Court*, 883 F.2d 810, 815 (9th Cir. 1989) (opportunity to raise federal contentions as defenses is sufficient).

There remains, however, one further complication in this case. The parties are not identical in the state and federal lawsuits. In state court the District is plaintiff, and Mother and P.P. are defendants. In federal court Mother and P.P. are joined as plaintiffs by J.L. and the Estate of R.L., who are not parties in the state case. Likewise, the District is not the only defendant; an additional defendant is Dr. Eicher, who is not a party in the District's state suit to recover the cost of the children's education. Consequently, we must decide whether *Younger* bars the claims of J.L. and the Estate of R.L. against either defendant, and bars the claims of all plaintiffs against Dr. Eicher, even though J.L., the Estate of R.L., and Dr. Eicher are not parties in the state case. As we proceed to explain, we hold that the *Younger* bar does extend to these claims.

Two 1975 Supreme Court opinions provide guidance. In *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 924 (1975), three bartenders faced with a local ordinance prohibiting topless dancing filed federal challenges to the constitutionality of the ordinance. One bartender violated the ordinance and was prosecuted. *Id.* at 925. The other two did not. *Id.* at 924-25. The Court held that *Younger* barred the claim of the prosecuted bartender, but not the claims of the other bartenders. It added, however, that "there plainly may be some circumstances in which legally distinct parties are so closely related that they should all be subject to the *Younger* considerations which govern any one of them." *Id.* at 928. In the other case, *Hicks v. Miranda*, 422 U.S. 332, 334-35 (1975), a state prosecuted theater employees for showing an obscene film, and seized several copies of the film. When the theater owners brought a federal-court challenge, the Court applied *Younger*. The Court wrote, "Absent a clear showing that [the owners] . . . could not seek the return of their property in the state proceedings and see to it that their federal claims were presented there," *Younger* abstention could not be avoided. *Id.* at 349. The owners, it said, "had a substantial stake in the state proceedings, so much so that they sought federal relief . . . . Obviously, their interests and those of their employees were intertwined; and, as we have pointed out, the federal action sought to interfere with the pending state prosecution. *Id.* at 348-49.

Doran illustrates that it is proper for a federal court to exercise jurisdiction over the claim of a genuine stranger to an ongoing state proceeding even though a federal decision clearly could influence the state proceeding by resolving legal issues identical to those raised in state court--for example, both proceedings may involve challenges to the same ordinance as an unconstitutional restraint on expressive activity. *See Doran*, 422 U.S. at 928. So long as the stranger has its own distinct claim to pursue, it may even be aligned with the state-court litigant in a common enterprise of vindicating the policy that gives rise to their individual claims. *See Federal Home Loan Bank Bd. v. Empie*, 778 F.2d 1447, 1452 (10th Cir. 1985); *Robinson v. Stovall*, 646 F.2d 1087, 1091 (5th Cir. 1987) ("neither a common interest in the outcome of federal litigation nor a common effort in pressing it requires abstention as to all plaintiffs"). But when in essence only one claim is at stake and the legally distinct party to the federal proceeding is merely an alter ego of a party in state court, *Younger* applies. *See Cedar Rapids Cellular Tel., L.P. v. Miller*, 280 F.3d 874, 882 (8th Cir. 2002) (corporation cannot avoid *Younger* by having subsidiaries sue in federal court when federal relief could obstruct enforcement of any state-court remedy); *Spargo v. N.Y. State Comm'n on Jud. Conduct*, 351 F.3d 65, 81-84 (2d Cir. 2003) (*Younger* applies to persons not parties in state proceeding when free-speech right asserted is purely derivative of free-speech rights of defendant in state proceeding).

J.L. and the Estate of R.L. seek to vindicate in federal court the right of the children to the education they received from the District. The state-court defense of Mother and P.P. that they do not have to pay the District for that education necessarily derives from the entitlement of the children to that education. As Judge Wisdom wrote in ***Robinson***, "The federal plaintiffs and state defendants in ***Hicks*** had much closer mutual interests than common membership in, or support of, a large political organization: they were the owners and employees of the same small business." 646 F.2d at 1092. Here we are presented with a familial relationship, even closer than the business relationship in *Hicks*, and with similar preclusive consequences. *Cf.* Restatement (Second) of Judgments § 41(1)(c) (person is bound by judgment binding "executor, administrator, *guardian*, conservator, or similar fiduciary manager of an interest of which the person is a beneficiary" (emphasis added)); *id.* § 51(1) (preclusive effect of judgment when party in one case is vicariously liable for conduct of party in other case). Accordingly, we hold it improper under ***Younger*** to exercise federal jurisdiction over the claims of J.L. and the Estate of R.L. even though they are not parties to the state-court suit.

Plaintiffs' claims against Dr. Eicher are similarly barred because of the close connection of those claims to their claims in state court and the close connection of Dr. Eicher to the District, which is the plaintiff in state court. Plaintiffs' allegation against Dr. Eicher is that he was the officer of the District responsible for many of its allegedly unlawful actions. Whether Dr. Eicher's actions were appropriate depends on whether the children were entitled to the education they received. Plaintiffs' claim against Dr. Eicher is derivative of, if not the same as, their claim against the District. The relationship between Dr. Eicher and his former employer, the District, is comparable to that between the theater owners and their employees in *Hicks*. In the context of the claims on appeal, Dr. Eicher is a mere alter ego of the District.

B. The IDEA Claims

When Mother was informed of the District's plan to expel the children as nonresidents, she asked the District for a due-process hearing under the IDEA. Plaintiffs' federal suit claims that the District's denial of this request constitutes an actionable violation of the IDEA. As we understand this claim, it does not assert any right of the children to the education received from the District and resolution of the claim would not interfere with the state-court litigation. Thus, there is no *Younger* bar.

Nevertheless, we are compelled by our decision in *T.S. v. Ind. Sch. Dist. No. 54,* 265 F.3d 1090 (10th Cir. 2001), to affirm the district court's decision denying relief. In that case we held that "[f]or a claim based on deprivation of [an IDEA] due process hearing . . . to be cognizable, [it] must be linked with a consequent loss of substantive benefits." *Id.* at 1093. Here, there was no "loss of substantive benefits." Not only do Plaintiffs fail to allege any connection between the denial of the due-process hearing and any substantive educational harm, they fail to allege any substantive educational harm at all. Indeed they tell us that "all parties agree that the school district provided [the children] an 'appropriate public education' . . . during the time they attended school in the district." Aplt. Br. at 10. Plaintiffs do not contend on appeal that expulsion of the children between January 14 and January 21, 2000, constitutes a substantive educational harm. (Apparently, Mother and P.P. were too ill to take the children to school.) Thus, under *T.S.*, we must affirm.

Plaintiffs may, however, be contending that the substantive harm is the state-court suit to recover the cost of educating the children; they say that the suit was "the ultimate result" of the denial of the due-process hearing. Aplt. Reply Br. at 7. But to the extent that Plaintiffs raised this contention below, *Younger* deprived the district court of jurisdiction to resolve it. The state suit would constitute an injury to Plaintiffs only if it lacked merit; and, as explained above, *Younger* prohibits federal litigation that seeks to establish the lack of merit of pending state litigation.

So, too, for Plaintiffs' remaining contention--that the state-court suit violated the IDEA independently of the denial of the due-process hearing. A decision that the state-court suit violated the IDEA would necessarily imply that the children were entitled to the education they received. Thus, it would preclude the District's state-court claim, contrary to *Younger*.

Finally, we observe that P.P. lacks standing to raise the only claim not barred by *Younger*. The constitutional mandate that federal courts can hear only a Case or Controversy, U.S. Const. art. III § 2, requires "a plaintiff [to] show [that] (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Env. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000). Here P.P. fails to show a redressable injury in fact with respect to the nonbarred claim. Although the denial of a right guaranteed by statute may constitute an injury in fact, *see Fed. Election Comm'n v. Akins*, 524 U.S. 11, 21 (1998), P.P. does not (and could not) contend that the IDEA granted him the right to a hearing, *see* 20 U.S.C. §§ 1415(a) (hearing provided for children and their parents), 1401(19) (defining "parent"). The only injury alleged by P.P. is the state-court litigation. That alleged injury may give him standing with respect to the claims barred by *Younger*, but it is not an injury redressable through the one nonbarred claim--which is not barred precisely because it does not question the state-court litigation. Therefore, the district court properly dismissed this claim of P.P.'s for lack of standing, and we AFFIRM that dismissal.

With respect to the other claims, we AFFIRM the judgment below as to the IDEA claim based on alleged denial of a due-process hearing, VACATE the judgment as to all other claims raised on appeal, and REMAND for the district court to STAY proceedings on the claims for damages and DISMISS without prejudice the remaining vacated claims..

APPENDIX B – OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS DATED AND DECIDED JULY 25, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

D.L., INDIVIDUALLY)
AND AS NEXT FRIEND)
OF J.L., R.L., MINORS,)
Plaintiffs,)
) CIVIL ACTION
) No. 00-2439-CM
v.)
)
)
THE UNIFIED SCHOOL)
DISTRICT # 497, AND)
DR. DOUGLAS EICHER,)
School Administrator,)
Individually and)
in His Official Capacity,)
Defendants.)

MEMORANDUM AND ORDER

Pending before the court are defendants' Motion to Strike Jury Demand (Doc. 224), plaintiffs' Motion for Injunctive and Declaratory Relief (Doc. 228), defendants' Motion for Judgment on Partial Findings (Doc. 230), defendants' Motion to Dismiss Complaint, or for Other Sanctions (Doc. 177), and defendants' Statement of Fees and Costs Associated with Motion to Dismiss Complaint (Doc. 178). Also pending are plaintiffs' Notice of Suggestion of Death on the Record Pursuant to Federal Rule of Civil

Procedure 25(a)(1) (Doc. 240) and Motion to Substitute Party (Doc. 241). As set forth below, defendants' Motion to Strike Jury Demand is granted; plaintiffs' motion for Injunctive and Declaratory Relief is denied; defendants' Motion for Judgment on Partial Findings is granted; plaintiffs' Motion to Substitute Party is granted, and defendants' Motion to Dismiss Complaint or for Other Sanctions (Doc. 177) is denied.

I. Background

In the court's Memorandum and Order dated September 17, 2002 (hereinafter "September 17 Order"), as modified in Docs. 169 and 172, the court, *inter alia*, granted in part and denied in part defendants' motion for summary judgment and plaintiffs' motion for partial summary judgment. The only claim remaining for trial was plaintiffs' claim brought under the Individuals with Disabilities Education Act, 20 U.S.C. § 1401 *et seq.* (IDEA), against defendants Unified School District #497 (hereinafter "defendant U.S.D. #497") and Dr. Douglas Eicher in his official capacity.

On December 6, 2002, the parties entered into a stipulation regarding the trial of this case. The parties stipulated that, in lieu of a trial, plaintiffs would file a motion for final and permanent injunctive relief. The stipulation provided that defendants would respond to plaintiffs' motion and present additional arguments which would have formed the basis for a motion for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50 had the case been tried to the court. As defendants point out, the court must apply the standard set forth in Federal Rule of Civil Procedure 52, which applies to a trial without a jury. The parties' motions are fully briefed and ripe for review.

The court incorporates by reference the uncontroverted facts set forth in the September 17 Order.

II. Motion to Substitute Party

On June 25, 2003, plaintiffs filed a Notice of Suggestion of the Death of Plaintiff R.L. on the Record Pursuant to Federal Rule of Civil Procedure 25(a)(1). The same day, plaintiffs requested that the Estate of R.L. be substituted as a party plaintiff. The court expresses its sincere condolences to the family of R.L. in granting plaintiffs' motion to substitute.

III. Motion for Declaratory and Injunctive Relief and Motion for Judgment on Partial Findings

In their motion, plaintiffs request a declaration that defendant U.S.D. # 497 violated their rights under IDEA. Further, they request injunctive relief in the form of an order from the court requiring defendants (1) "to comply with IDEA by providing plaintiffs with the due process hearing which they previously requested from the defendant," (2) to provide plaintiffs with a free appropriate public education (FAPE), including compensatory education, as determined by the due process hearing, and (3) "preventing defendant from recouping any costs of educating [plaintiffs]."

A. Standard

Federal Rule of Civil Procedure 52(c) provides:

> If during a trial without a jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim or

> defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, or the court may decline to render any judgment until the close of all the evidence. Such a judgment shall be supported by findings of fact and conclusions of law as required by subdivision (a) of this rule.

Rule 52(a) provides, in in relevant part:

> "[i]n all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

As set forth below, the court concludes that it has subject matter jurisdiction to award the requested relief.

B. Subject Matter Jurisdiction

Defendants argue that the court lacks subject matter jurisdiction because plaintiffs never filed a complaint with the Kansas State Board of Education (hereinafter "State BOE"), thus failing to exhaust their administrative remedies. In the September 17 Order, the court held that plaintiffs were not required to appeal to the State BOE the district's refusal to provide plaintiffs with a due process hearing, because such an appeal would be futile. However, the court did not discuss defendants' argument that plaintiffs were also required to exhaust their administrative remedies by filing a complaint with the State BOE pursuant to the Complaint Resolution Procedures (CRP) established by the State of Kansas in order to implement IDEA – a process separate from the due process hearing.

Defendants contend that, because plaintiffs assert that defendants' denial of a due process hearing, in and of itself, violated IDEA, plaintiffs were also required to file a complaint with the State BOE pursuant to the CRP.

The federal regulations concerning IDEA provide, in relevant part, that "[a] complaint alleging a public agency's failure to implement a due process decision must be resolved by the SEA." 34 C.F.R. §300.661(c)(3). The SEA, or state educational agency, for Kansas is the State BOE. Kan. Stat. Ann. § 72-966(c)(2).

1. Due Process and CRP

The CRP procedure was adopted in response to IDEA's requirement that any SEA or local educational agency (LEA) receiving assistance under the law "shall establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies." 20 U.S.C. § 1415(a). The procedures require written notice to parents prior to a change in the educational placement of a child. *Id.* § 1415(b)(3). The agencies must also provide an opportunity for parents to present complaints regarding the educational placement of a child or the provision of a free appropriate public education (FAPE). *Id.* § 1415(b)(6).

In addition, the U.S. Department of Education promulgated regulations requiring each SEA receiving funds under IDEA to adopt written procedures for the resolution of "any complaint" that a public agency has violated IDEA. 34 C.F.R. §§ 300.660-300.662 (enacted pursuant to the Department of Education's general rulemaking authority as set forth in 20 U.S.C. § 1221e-3). The regulations contemplate that a complaint may be filed with both the CRP and the IDEA due process hearing system. *Id.* § 300.661(c). If an issue raised in the CRP is also raised in a due process hearing, "the State must set aside any part of the complaint that is being addressed in the due process hearing, until the conclusion of the hearing." *Id.* § 300.661(c)(1). A decision on any issue in a due process hearing is binding on a subsequent CRP involving the same parties. *Id.* § 300.661(c)(2). Finally, the regulations further state that the CRP must resolve a complaint alleging a public agency's failure to implement a due process decision. *Id.* § 300.661(c)(3). The regulations do not, however, state that a parent must exhaust the CRP to enforce a due process decision in court.

The Kansas state law implementing IDEA, the Special Education for Exceptional Children Act, requires the State BOE to establish procedures for resolution of disputes arising regarding the educational placement of a child and a district's provision of FAPE, "through a mediation process or through due process hearings which meet the requirements of the federal law and this act." *Id.* § 72-963a. The State BOE's regulations implementing the Act provide that "[i]f a disagreement arises between a parent and an agency[1] concerning the . . . educational placement of the parent's exceptional child, or the provision of FAPE to the child, the parent or the agency, or both, may request mediation or initiate a due process hearing." Kan. Admin. Reg. 91-40-28 (a). Further, the regulation states "[i]f a disagreement as described in subsection (a) of this regulation arises, the parent or the agency, or both, may initiate a special education due process hearing. Each due process hearing shall be provided for by the agency directly responsible for the education of the child." *Id.* § (c). Within five business days after the request for a due process hearing, the agency providing for the hearing must furnish to the parent a list of qualified due process hearing officers. *Id.* § (d)

In addition, the State BOE's regulations provide that "[a]ny person may file a written, signed complaint alleging that an agency has violated a state or federal special education law or regulation. Also, a prevailing party in a due process hearing may file a complaint alleging that the other party has failed to implement the hearing decision. The complaint shall state the facts upon which it is based and shall be filed with the commissioner of education." *Id.* § 91-40-51(a)(1)(A). The commissioner of education then investigates the complaint and issues a written report of findings and any corrective actions that are required, as well as a timeframe for their implementation. *Id.* Further, any agency or complainant may appeal the findings of the compliance report by filing a written notice of appeal with the state commissioner of education, within ten days of the date of the report. *Id.* § (c)(1).

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[1] "Agency" is defined as "boards and state agencies." Kan. Admin. Reg. 91-40-1(b).

The regulations concerning the CRP provide that, in the event a complaint "is received that is also the subject of a due process hearing or that contains multiple issues of which one or more are part of the due process hearing, the complaint or the issues that are part of the due process hearing shall be set aside until conclusion of the hearing." *Id.* (d)(1). Finally, "[i[f an issue that has previously been decided in a due process hearing involving the same parties is raised in a complaint, the hearing decision shall be affirmed and the complainant informed of that action."

2. Analysis

The court must determine whether plaintiffs were required to exhaust their administrative remedies available under the CRP in addition to requesting a due process hearing. As the court noted in the September 17 Order, "[a] party's failure to plead compliance with IDEA's statutory exhaustion requirements precludes the court from exercising subject matter jurisdiction." (Sept. 17 Order at 57) (citing *Cudjoe*, 297 F.3d at1064 ("We believe that both the language and the policy of the IDEA suggest that if a student with a disability seeks to bring a claim for educational injuries, then he must plead and show either that he has exhausted his administrative remedies under the IDEA or that the relief he is seeking is not available under the IDEA.")). Courts have held that IDEA's exhaustion requirements reflect Congress's view that courts lack the "specialized knowledge and experience" necessary to resolve "persistent and difficult questions of educational policy." *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 208 (1982) (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973)). Nevertheless, the Tenth Circuit has held that exhaustion is not required "when administrative remedies would be futile, when they would fail to provide relief, or when 'an agency has adopted a policy or pursued a practice of generally applicability that is contrary to the law.'" *Urban by Urban v. Jefferson County Sch. Dist. R-1*, 89 F.3d 720 (10th Cir. 1996) (quoting *Ass'n for Cmty. Living v. Romer*, 992 F.2d 1040, 1044 (10th Cir. 1993) (quoting H.R.Rep. No. 296, 99th Cong., 1st Sess. at 7 (1985)).

In discussing IDEA's exhaustion requirements, the Tenth Circuit has never mentioned the CRP, much less held that a litigant must exhaust the state CRP in addition to a due process hearing. As set forth later in the opinion, the court's review of the law revealed that no court has required exhaustion of CRP in addition to a due process hearing. In *Cudjoe*, the Tenth Circuit explained the required administrative remedies as follows:

> These procedural safeguards include the right to examine all records and "participate in meetings with respect to identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent evaluation of the child," *id.* § 1415(b)(1); the right to receive prior written notice when the school proposes to change or refuses to change the identification, evaluation, or educational placement of the child, id. 1415(b)(3)(A)-(B); and "an opportunity to present complaints with respect to any matter relating to" the child's "identification, evaluation, or educational placement," *id.* § 1415(b)(6). **If the school receives such a complaint,**

> **parents are given the opportunity to have an impartial due process hearing on the matter**, *id.* § 1415(f), and the right to appeal any finding or decision reached in the hearing, *id.* § 1415(g).

Id. at 1604 (emphasis added).

Immediately following this discussion, the court noted that "[a]s part of the bargain of providing children with educational rights and parents with procedural safeguards to protect those rights, Congress required that parents turn first to the statute's administrative framework to resolve any conflicts they had with the school's educational services." *Id.* The court also stated that "IDEA's design provides a 'carefully structured procedure for administrative remedies,' which encourages parents to seek relief quickly when the injury occurs and 'allows the educational system to bring its expertise to bear in correcting its own mistakes.'"(citing *Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist.*, 288 F.3d 478, 486 (2d Cir. 2002)). The Tenth Circuit's discussion of the need for exhaustion implicated the due process hearing requirements set forth in §§ 1415(f) and (g), and characterized the impartial due process hearing process as the means to address complaints regarding a child's educational placement.

In the court's review of applicable law, the court found that all appellate courts that have addressed the issue whether IDEA requires exhaustion of CRP in addition to a due process hearing have held that exhaustion of CRP is not required. The court finds instructive the Third Circuit's analysis in *Jeremy H. by Hunter v. Mount Lebanon School District*, 95 F.3d 272 (3d Cir. 1996). In this case, the Third Circuit reversed the district court's dismissal of plaintiffs' claims due to his failure to plead them in a state administrative proceeding. The Third Circuit held that 34 C.F.R. §§ 300.660-300.662 "evince an expectation that invocation of the complaint procedures they establish will be elective, not mandatory." *Id.* at 283. The court noted that the language of the regulations is precatory ("[a]n organization or individual *may* file a signed written complaint") and that statements in the Federal Register concerning the adoption of the regulations indicated that the proposed rulemaking would create a procedure that is "available" to, and a "right" of, parents, rather than obligatory. *Id.* at 283 n.20 (citing 34 C.F.R. § 300.662; 56 Fed. Reg. 41, 266 at 41, 270; 57 Fed. Reg. 44,794 at 44,851).

The Second Circuit, in *Mrs. W. v. Tirozzi*, a case arising under the Education for the Handicapped Act (EHA), IDEA's precursor, held that exhaustion of CRP is not required prior to commencing a § 1983 action to enforce the Act. 832 F.2d 748, 758 (2d Cir. 1987). As the court stated:

> Significantly, § 1415(f) does not specify, directly or by incorporating its legislative history, exhaustion of possible CRP remedies. In fact, research has unearthed no statute or regulation that requires exhaustion of CRP remedies prior to commencing a § 1983 action based on alleged EHA violations. Plainly, state administrative remedies must be exhausted when a federal statute so provides. Turning to the EHA caselaw, we note that the Supreme Court has never suggested that the CRP need to be invoked or exhausted prior to seeking federal court involvement in construing the EHA

> pursuant to § 1415. (citing Smith, 468 U.S. at 994-102; Rowley, 458 U.S. at 177-210.)

Id.

More recently, the Ninth Circuit held that requiring exhaustion of CRP "would add an additional step of administrative exhaustion not contemplated by IDEA." *Porter v. Bd. of Trs. of Manhattan Beach Unified Sch. Dist.*, 307 F.3d 1064 (9th Cir. 2002), *cert. denied*, 123 S. Ct. 1303 (2003). In *Porter*, the court discussed *Jeremy H.* and *Mrs. W.*, pointing out that, when IDEA was amended in 1997, Congress, despite being presumably knowledgable about these prior decisions interpreting IDEA, chose not to include a CRP exhaustion requirement. *Id.* at 1072 (citing *United States v. Hunter*, 101 F.3d 82, 85 (9th Cir. 1996)). The court also noted that the US Department of Education "has never interpreted its CRP regulations as creating a mandatory step before suit alleging an IDEA violation," and that this administrative interpretation must be accorded deference:

> Because the CRP "is a creature of the [Department's] own regulations, [its] interpretation of it is, under our jurisprudence, controlling unless 'plainly erroneous or inconsistent with the regulation.'" *Auer v. Robbins*, 519 U.S. 452, 461, 117 S. Ct. 905, 137 L.Ed.2d 79 (1997)(quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332,359 (1989)). According to the Department, the CRP is intended to "allow [parents and school districts] to resolve differences without resort to more costly and litigious resolution through due process," not to create a mechanism that must be exhausted in addition to the due process

> system.Assistance to States for the Education of Children With Disabilities, 64 Fed. Reg. 12,406, 12,646 (March 12, 1999) (comment); *see also* Office of Special Education Programs Memorandum 00-20 (July 17, 2000) ("OSEP Memorandum 00-20") (describing CRP regulations as attempt to provide "a less costly and more efficient mechanism for resolving disputes than the impartial due process hearing system"); *cf. Lucht v. Molalla River Sch. Dist.*, 225 F.3d 1023, 1028-29 (9th Cir. 2000) (describing CRP regulations). The Department has repeatedly instructed that parents are "not required to use [the CRP] ... in addition to the due process hearing system." OSEP Memorandum 00-20; *see also* Letter from Office of Special Education Programs to Johnson, 18 Ind. Disab. Educ. L. Rep. 589, 590 (Dec. 4, 1991) (explaining that "[t]he due process and [CRP] procedures are two separate, distinct, or independent remedies"). We can find nothing to counter the argument made by the government as amicus in this case that requiring the exhaustion of CRP procedures to bring an action in court to enforce the order of a due process hearing would be directly contrary to the U.S. Department of Education's reasonable interpretation of its own regulations.

Id. at 1072-73.

The court finds persuasive the analysis presented by the Third, Second, and Ninth Circuits. However, the court wishes to address defendants' argument that that plaintiffs were required to follow the CRP under the test set forth by the Supreme Court in *McCarthy v. Madigan*, 503 U.S. 140 (1992).

In *McCarthy*, the Court held that, with regard to exhaustion of administrative remedies, "where Congress specifically mandates, exhaustion is required." *Id.* at 144. Where, as with the CRP, an administrative scheme is not congressionally mandated, a court must exercise its "sound judicial discretion" in determining whether exhaustion is required, giving deference "to Congress' power to prescribe the basic procedural scheme under which a claim may be heard in a federal court requires fashioning of exhaustion principles in a manner consistent with congressional intent and any applicable statutory scheme." *Id.* After discussing the benefits of exhaustion in promoting judicial efficiency and developing an adequate factual record, the court articulated the test as follows: "In determining whether exhaustion is required, federal courts must balance the interest of the individual in retaining prompt access to a federal judicial forum against countervailing institutional interests favoring exhaustion. '[A]dministrative remedies need not be pursued if the litigant's interests in immediate judicial review outweigh the government's interests in the efficiency or administrative autonomy that the exhaustion doctrine is designed to further.'" *Id* (citation omitted). In particular, the court identified as illustrative "three broad sets of circumstances in which the interests of the individual weigh heavily against requiring administrative exhaustion." *Id.* at 146. First, exhaustion is not required when "requiring resort to the administrative remedy may occasion undue prejudice to subsequent assertion of a court action," such as prejudice incurred from "an unreasonable or indefinite timeframe for administrative action." *Id.* at 146-47. "Second, an administrative remedy may be inadequate 'because of some doubt as to whether the administrative agency was empowered to grant effective relief.'" *Id.* at 147 (citing *Gibson v. Berryhill*, 411 U.S. 564, 575 (1973)). Third, "an administrative remedy may be inadequate where the administrative body is shown to be biased or has otherwise predetermined the issue before it." *Id.* at 148.

Applying the *McCarthy* test, the court finds that the interests of the plaintiffs in obtaining relief outweigh the interest of the state in requiring plaintiffs to exhaust a second administrative procedure. The court does not believe that requiring exhaustion of CRP in addition to a due process hearing would promote either efficiency or administrative autonomy. Although the court no doubt would have benefitted from having received a factual record determined in the state administrative process, the court cannot find that these institutional interests promoted by exhaustion of administrative remedies would be served by requiring plaintiffs to complain to the State BOE when the school district failed to provide plaintiffs with the hearing they had requested under IDEA, following the administrative procedures established by the statute. Though the court makes this determination in light of *McCarthy*'s general balancing test, this finding may be generalized into falling into the first category identified in *McCarthy*. Specifically, the court finds it is not reasonable to require exhaustion of the CRP when plaintiffs had already sought administrative relief through a due process hearing.

In light of the persuasive authority that IDEA does not require exhaustion of CRP prior to bringing suit, and the court's finding that it is not required under *McCarthy*, the court holds that plaintiffs were not required to appeal defendant U.S.D. #497's decision denying a due process hearing to the State BOE through the CRP. Accordingly, the court finds it may exercise subject matter jurisdiction.

C. IDEA

As the court noted in its September 17 Order, plaintiffs claim their rights were violated under IDEA due to (1) defendants' failure to provide them with a due process hearing and (2) plaintiffs' absence from school for a period of time in January 2000.

The Tenth Circuit has held that "[f]or an IDEA claim based on deprivation of a due process hearing and/or other procedures to be cognizable [it] must be linked with a consequent loss of substantive benefits." *T.S. v. Indep. Sch. Dist. No. 54*, 265 F.3d 1090, 1093 (10th Cir. 2001), *cert. denied*, 523 U.S. 927 (2002). "Procedural defects alone do not constitute a violation of the right to a FAPE unless they result in the loss of an educational opportunity." *Id.* at 1095. Here, the court finds that plaintiffs did not incur a loss of substantive educational benefits recognizable under IDEA. As such, defendants' failure to provide a due process hearing did not violate plaintiffs' rights under IDEA.

In making its findings pursuant to Rule 52, the court finds that plaintiffs have not proven that defendants' actions caused plaintiffs to lose substantive benefits cognizable under IDEA. Further, in light of the Tenth Circuit's holding in *T.S.* set forth above, the court rejects plaintiffs' argument that the denial of the due process hearing was itself a denial of a substantive benefit. As a consequence, defendants' failure to provide a due process hearing, a procedural defect at best, did not violate IDEA.

The court incorporates by reference its discussion of the facts on pages 45-47 of the September 17 Order with the following modifications:

(1) The court finds plaintiffs were permitted to attend school on January 13, 2000.

(2) The court takes judicial notice that no classes were held in the district on Monday, January 17, 2000, due to the Dr. Martin Luther King, Jr. holiday.

(3) The court finds that R.L. and J.L. did not attend school on January 18 and 19 because, as stated by the attorney for plaintiffs at the time, D.L. and P.P. were too sick to drive the children to school.

(4) The court finds that R.L. and J.L. were permitted to return to school on January 24, 2000, the day upon which D.L. returned the affidavit of residency. However, D.L. could have returned the letter prior to such time, and the children could have attended school in the district as early as January 20, 2000.

Though defendants claim no classes were held January 14, 2000, due to a day allotted to teachers for first semester grade preparation, the court did not locate evidence in the record to support this contention. The court reiterates the uncontroverted fact provided in the September 17 Order that R.L. and J.L. are receiving an appropriate education in the schools that they currently attend.

Given the facts before it, the court concludes that plaintiffs have failed to meet their burden to prove by a preponderance of the evidence that defendants' denial of a due process hearing was linked to a loss of substantive benefits. Plaintiffs have not met their burden to prove that defendants' actions were the cause of the missed school days. Rather, the evidence in the record indicates plaintiffs' lack of attendance was due to alternative causes. Even if the court were to apply the standard set forth in Federal Rule of Civil Procedure 50 for judgment as a matter of law, which requires the court to find that "there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue," the court would find that no reasonable jury could find that defendants' actions were the cause of the missed school days.

Further, in the particular circumstances of this case, the court determines that plaintiffs' nonattendance at defendant U.S.D. #497 for a period of time in January did not constitute a "change in educational placement" under IDEA prior to which a notice and hearing were required, and did not constitute a denial of FAPE. In the case at bar, defendants permitted plaintiffs to return to the school district after January 24, 2000, the date upon which D.L. executed her affidavit of residency. Defendant argues that plaintiffs' absence from school was not a suspension or expulsion.

IDEA requires a state receiving funds under the statute to adopt procedures to ensure that a FAPE "is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school." 20 U.S.C. § 1412 (a)(1)(A). Construing the facts in the light most favorable to plaintiff, and thus viewing plaintiffs' absence from school as a suspension or expulsion, the court finds that no "change in educational placement" within the meaning of IDEA, or denial of FAPE, occurred.

In *Honig v. Doe*, the Supreme Court deferred, based upon statutory ambiguity, to the United States Department of Education's Office of Special Education Programs' policy letter advising that suspension of more than ten days constitutes a "change in placement" under the EHA. 484 U.S. 305, 326 n.8 (1988). The Court found that this interpretation was in keeping with Congress's intent in adopting the EHA. *Id.* As the Supreme Court more recently noted in *Davis v. Monroe County Board of Education:*

> The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 *et seq.* (1994 ed., Supp. III), moreover, places strict limits on the ability of schools to take disciplinary actions against students with behavior disorder disabilities, even if the disability was not diagnosed prior to the incident triggering discipline. *See, e.g.*, § 1415(f)(1) (parents entitled to hearing when school proposes to change disabled student's educational placement); § 1415(k)(1)(A) (school authorities can only "order a change in the placement of a child with a disability . . . to an appropriate interim alternative educational setting, another setting, or suspension" for up to "10 school days" unless student's offense involved a weapon or illegal drugs); §1415(k)(8).

526 U.S. 629, 664 (1999). Though these cases discuss suspension in the context of disciplinary problems, the court finds they are applicable to the case at bar, in which plaintiffs assert they were suspended because defendants believed they did not reside in the school district. Here, even if plaintiffs were considered to have been suspended

from school from January 14-24 and such absence was due to defendants' conduct, plaintiffs missed only six school days (January 14, 18-21, and 24). Consequently, no change in educational placement or denial of FAPE occurred under § 1415(k) and the Supreme Court's interpretation of IDEA. Accordingly, the court finds plaintiffs cannot recover upon their IDEA claim. Plaintiffs' motion for declaratory and injunctive relief is denied. Defendants' motion for judgment on partial findings is granted.

IV. Motion to Dismiss Complaint or for Other Sanctions

Defendants move the court for an order dismissing plaintiffs' complaint, or in the alternative, for other sanctions, due to plaintiffs' alleged failure to comply with the court's pretrial order governing Final Witness and Exhibit Lists. Defendants state plaintiffs failed to submit final witness and exhibit lists by the September 19 deadline agreed to by the parties. In addition, defendants state they did not receive the lists from plaintiffs until September 23, and that such lists failed to specifically itemize the exhibits plaintiffs intended to offer. Plaintiffs' counsel states that he underwent surgery on September 20 and experienced complications in the following days, and that, although he intended to submit the lists on September 19 prior to the surgery, his failure to do so was an oversight.

Although Federal Rule of Civil Procedure 37(c) authorizes the court to enter sanctions due to a party's failure to comply with discovery deadlines, the court believes an entry of sanctions would be inappropriate here. Specifically, any delay due to plaintiffs' counsel's failure to timely disclose the lists did not prejudice defendants, because the case was not in fact tried beginning October 8. Defendants' motion is denied.

V. Statement of Fees and Costs Associated with Motion to Dismiss Complaint

In the September 17 Order, the court granted in part defendants' Motion to Dismiss Complaint or for Sanctions (Doc. 66), stating that: "Plaintiffs are hereby ordered to pay the defendants' attorney's fees incurred in drafting plaintiffs' portion of the pretrial order. Further, plaintiffs are ordered to pay the attorney's fees incurred by defendants in drafting the instant Motion to Dismiss Complaint. Defendants are ordered to submit a Statement of Attorneys' Fees and costs to the court by September 26, 2002."

In their statement (Doc. 178), defendants request reimbursement for 5.6 hours of attorney time in connection with the above items. The court has reviewed the billing records submitted and finds them to be reasonable. Accordingly, the court awards defendants $896.00 in attorneys' fees associated with plaintiffs' failure to cooperate in the preparation of the pretrial order.

VI. Order

IT IS THEREFORE ORDERED THAT defendants' Motion to Strike Jury Demand (Doc. 224) is granted.

IT IS FURTHER ORDERED THAT plaintiffs' Motion for Injunctive and Declaratory Relief (Doc. 228) is denied.

IT IS FURTHER ORDERED THAT, defendants' Motion for Judgment on Partial Findings (Doc. 230) is granted.

IT IS FURTHER ORDERED THAT defendants' Motion to Dismiss Complaint, or for Other Sanctions (Doc. 177) is denied.

IT IS FURTHER ORDERED THAT plaintiffs' Motion to Substitute Party (Doc. 241) is granted.

IT IS FURTHER ORDERED THAT defendants are hereby awarded attorneys' fees of $896.00 as set forth in the September 17 Order pursuant to defendants' Statement of Fees and Costs Associated with Motion to Dismiss Complaint (Doc. 178).

This case is hereby dismissed.

Dated this 25th day of July 2003, at Kansas City, Kansas.

S/CARLOS MURGUIA
CARLOS MURGUIA
United States District Judge

APPENDIX C – OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS DATED AND DECIDED OCTOBER 4, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

FILED
U.S. DISTRICT COURT
DISTRICT OF KANSAS
02 OCT -4 PM 5:06
RALPH L. DELOACH
CLERK
BY ____ DEPUTY
AT KANSAS CITY, KS

D.L., INDIVIDUALLY)
AND AS NEXT FRIEND)
OF J.L., R.L., MINORS,)
Plaintiffs,)
) CIVIL ACTION
) No. 00-2439-CM
v.)
)
)
THE UNIFIED SCHOOL)
DISTRICT # 497, AND)
DR. DOUGLAS EICHER,)
School Administrator,)
Individually and)
in His Official Capacity,)
Defendants.)

MEMORANDUM AND ORDER

Pending before the court is defendant Unified School District # 497's Motion for Reconsideration and/or for Relief From Order (Doc. 172). As set forth below, defendant's motion is granted.

Defendant Unified School District # 497 (hereinafter "defendant U.S.D. # 497") moves the court to reconsider the portion of its September 17, 2002 Memorandum and Order (Doc. 168) (hereinafter "September 17 order") entering partial summary judgment against defendant U.S.D. # 497 on a theory of procedural due process.

After considering defendant's motion and plaintiff's response, and upon reexamination of the parties' summary judgment motions, the Pretrial Order, and the Complaint, the court acknowledges that it erred by granting partial summary judgment against defendant U.S.D. # 497 on a procedural due process theory. The parties preserved a substantive due process claim in the Pretrial Order, but did not preserve a procedural due process claim--effecting a waiver of that issue. *See* Fed.R.Civ.P. 16(e); *Hullman v. Bd. Of Trs.*, 950 F.2d 665, 667 (10th Cir. 1991).

IT IS THEREFORE ORDERED THAT for the reasons set forth in defendant's motion to reconsider, the court grants defendant's Motion to Reconsider.

IT IS FURTHER ORDERED THAT the court's September 17, 2002 order (Doc. 168) is hereby modified:

Section X.D.1 (pp. 62-66), entitled "Procedural Due Process," is hereby stricken.

The final sentence of the September 17 order is hereby modified to read, "In sum, the only claim that remains for trial is plaintiffs' IDEA claim against defendants U.S.D. # 497 and Eicher, in his official capacity only."

Dated this 4th day of October, 2002 at Kansas City, Kansas.

S/CARLOS MURGUIA
CARLOS MURGUIA
United States District Judge

APPENDIX D – OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS DATED AND DECIDED OCTOBER 1, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

FILED
U.S. DISTRICT COURT
DISTRICT OF KANSAS
02 OCT -1 AM 11:38
RALPH L. DeLOACH
CLERK
BY ______ DEPUTY
AT KANSAS CITY, KS

ENTERED ON THE DOCK
DATE 10-2-02

D.L., INDIVIDUALLY)
AND AS NEXT FRIEND)
OF J.L., R.L., MINORS,)
Plaintiffs,)
) CIVIL ACTION
) No. 00-2439-CM
v.)
)
)
THE UNIFIED SCHOOL)
DISTRICT # 497, AND)
DR. DOUGLAS EICHER,)
School Administrator,)
Individually and)
in His Official Capacity,)
Defendants.)

MEMORANDUM AND ORDER

Pending before the court is defendant Unified School District # 497's (U.S.D.# 497) Motion for Stay Pending Appeal (Doc. 174). As set forth below, the court amends its September 17, 2002 order. Accordingly, the court denies defendant U.S.D. # 497's Motion for Stay Pending Appeal.

1. Motion for Stay Pending Appeal

Defendant U.S.D. # 497 moves the court for an order staying all proceedings pending appeal pursuant to Fed.R.App.P. 8(a). On September 23, 2002, defendants filed notice of their interlocutory appeal (Doc. 175) of the court's September 17, 2002 order (Doc. 168) (hereinafter "the September 17 order"). In its September 17 order, the court granted in part and denied in part defendants' motion for summary judgment. The court granted summary judgment in favor of defendants as to all claims except plaintiffs' claims under the Individuals with Disabilities Education Act (IDEA) and under the Due Process Clause of the U.S. Constitution. Specifically, the court noted that the only claims surviving the motion for summary judgment were plaintiffs' IDEA claims against defendant U.S.D. # 497 and defendant Dr. Douglas Eicher in his individual and official capacities, and plaintiffs' procedural due process claim, as against defendant U.S.D. # 497 only.

In their motion for stay, defendants state they have filed a notice of appeal from the September 17 order because the court should have determined that defendant Eicher is qualifiedly immune from suit as to plaintiffs' IDEA claims asserted against him in his individual capacity.

A. Jurisdiction

As defendants point out, the filing of an interlocutory appeal challenging a denial of qualified immunity "is an event of jurisdictional significance--it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Stewart v. Donges, 915 F.2d 572, 575* (10th Cir. 1990) (citing *Griggs v. Provident*

Consumer Disc. Co., 459 U.S. 56, 58 (1982)). An interlocutory appeal on a qualified immunity basis therefore "divests the district court of jurisdiction to proceed with any part of the action against an appealing defendant." *Id.*

Importantly, however, "[i]f a party files a notice of appeal after the court announces or enters a judgment--but before it disposes of any motion listed in Rule 4(a)(4)(A) [including a motion to alter or amend the judgment under Fed.R.Civ.P. 59, *see* Fed.R.App. 4(a)(4)(A)(iv); and a motion for relief under Fed.R.Civ.P. 60 if filed no later than 10 days after the judgment is entered, *see* Fed.R.App. 4(a)(4)(A)(iv)]--the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered." Fed.R.App.P. 4(a)(4)(B)(i).

In this case, defendants filed their notice of appeal on September 23, 2002, less than 10 days after the entry of judgment of the September 17, 2002 order. Defendants' notice of appeal is therefore premature, and has not divested the court of jurisdiction to enter an order pursuant to Fed.R.Civ.P. 59(e). *See Ellis v. CAC Fin. Corp.*, 6 Fed. Appx. 765, 768-69 (10th Cir. 2001). In *Ellis v. CAC Financial Corp.*, the Tenth Circuit held that the appellants' notice of appeal of a district court's decision on a motion for summary judgment "was timely, yet premature, because they also filed a Rule 60 motion on the same day as their notice of appeal." 6 Fed. Appx. 765, 768 (10th Cir. 2001)(citing Fed.R.App.P. 4(a)(4)(A)(iv)). Consequently, the notice of appeal "became effective when the district court denied their Rule 60 motion." *Id.* Even though *Ellis* did not concern a notice of appeal regarding the immediately appealable issue of qualified immunity, the express language of Fed.R.App.P. 4(a)(4) appears to encompass all appeals, and the court has found no case law to the contrary.

The court believes that *Ellis* and Fed.R.App.P. 4(a)(4) support the conclusion that the district court retains jurisdiction to enter an order pursuant to Rule 59, if the Rule 59 motion was filed within ten days after entry of judgment. However, in this case, defendants did not file a Rule 59(e) motion on the issue of qualified immunity. Notwithstanding, the court concludes that defendants' notice of appeal does not divest the court of jurisdiction to alter or amend its own judgment on the issue of qualified immunity, if the court acts within 10 days of the entry of its September 17, 2002 order.

The Tenth Circuit has recognized authority from other circuits indicating that a district court may alter or amend one of its orders *sua sponte* pursuant to Federal Rule of Civil Procedure 59(e), if the court acts within 10 days of the entry of judgment. *See Marshall v. Shalala,* 5 F.3d 453, 454-455 (10th Cir. 1993)(citing *Burnam v. Amoco Container Co.*, 738 F.2d 1230, 1231-32 (11th Cir. 1984)). Though the Tenth Circuit has not expressly held that such practice is permissible, the court did not use the opportunity presented in *Marshall* to reject the concept. *Id.* Rule 59(e) states that "[a]ny motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment." Fed.R.Civ.P. 59(e). Though Rule 59(e) is silent as to whether the court may order such relief on its own initiative, the Eleventh Circuit has interpreted the rule's silence to be without significance, given the court's inherent powers. *Burnam*, 738 F.2d at 1232 ("the authorizations in Rules 60(a) and 59(d) the court to act on its own motion are only declaratory examples of the general power of the court to act on its own initiative,") (quoting 6A *Moore's Federal Practice* ¶ 59.12[4] (updated version appears at 12 *Moore's Federal Practice*

¶ 59.33 (2001)); *see also* Fed.R.Civ.P. 1 (stating that the Federal Rules of Civil Procedure "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action"). Accordingly, the Eleventh Circuit recognized that "so long as the court acts within ten days after the entry of judgment, the court has the power on its own motion to consider altering or amending a judgment." *Id.*

Because the instant order is filed within ten days of the September 17, 2002 order, the court thus recognizes that it may, pursuant to Federal Rule of Civil Procedure 59(e), alter or amend its September 17, 2002 order.

B. Qualified Immunity

Foremost, the court clarifies that the September 17, 2002 order reflected the court's inference that defendants had not asserted the defense of qualified immunity in regard to plaintiffs' IDEA claim, but rather only in defense of the constitutional claims plaintiffs pled under 42 U.S.C. § 1983. Upon reexamination, however, the court finds that defendants did raise qualified immunity as a defense to the IDEA claim. Initially, the court notes that, in the Pretrial Order, defendants pled, as their first theory of recovery, the defense of qualified immunity to protect defendant Eicher "from pecuniary liability under § 1983." (Pretrial Order at 16). Further, both parties' summary judgment pleadings addressed the qualified immunity issue only in very general terms, without applying the doctrine to any of plaintiffs' specific claims. The court therefore did not believe defendants intended their qualified immunity defense to apply to plaintiffs' IDEA claim against defendant Eicher. In reexamining the Pretrial Order and the pleadings, the court notes that defendants stated in a previous section of the Pretrial Order, which provides a general list of defendants' defenses, that defendant Eicher "has qualified immunity with respect to plaintiffs' claims under 42 U.S.C. § 1983, or other federal laws." (Pretrial Order at 9). The court interprets this statement to encompass the IDEA claim against defendant Eicher. The court thus examines the qualified immunity defense as it pertains to plaintiffs' IDEA claim against defendant Eicher.

Public officials performing discretionary functions generally enjoy qualified immunity from civil damages liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). When a qualified immunity claim is raised in a motion for summary judgment, the relevant question is whether a reasonable official could have believed that his or her acts were lawful in light of clearly established law and the information the official possessed at the time of the allegedly unlawful conduct. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). The defense of qualified immunity is available to a defendant sued in his or her individual capacity, but is unavailable to the extent the defendant is sued in his or her official capacity. *Kentucky v. Graham*, 473 U.S. 159, 166-67 (1985).

The "contours" of the right allegedly violated "must be sufficiently clear that a reasonable official would understand that what he is doing violated that right." *Id.* at 635. The plaintiff "must do more than identify in the abstract a clearly established right and allege that the defendant has violated it." *Pueblo Neighborhood Health Ctrs., Inc. v. Losavio*, 847 F.2d 642, 645 (10th Cir. 1988). For a law to be considered "clearly established" for purposes of qualified immunity, "there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Patrick v. City of Overland Park*, 937 F.Supp. 1491, 1499 (D.Kan. 1996)(citing *Medina v. City and County of Denver*, 960 F.2d 1493, 1498 (10th Cir. 1992)). The plaintiff has the burden of establishing that the law was clearly established when the alleged violation occurred. *Pueblo Neighborhood Health Ctrs.*, 847 F.2d at 645.

When defendants move for summary judgment on the basis of qualified immunity, plaintiffs bear a heavier burden than is normally imposed to avoid summary judgment. Plaintiffs must show that the defendants violated clearly established law. *Hannula v. City of Lakewood*, 907 F.2d 129, 131 (10th Cir. 1990). To meet this burden, plaintiffs "must demonstrate a substantial correspondence between the conduct in question and prior law allegedly establishing the defendant's actions were clearly prohibited." *Id.*

If the plaintiffs meet their burdens of identifying the clearly established law that the defendants allegedly violated and demonstrating that the defendants' alleged conduct violated that law, the burden shifts to the defendants to show that no material issues of fact remain as to whether their actions were objectively reasonable in light of the law and the information they possessed at the time. *Pueblo Neighborhood Health Ctrs.*, 847 F.2d at 646. A showing of objective reasonableness entitles defendants to summary judgment unless the plaintiffs show that there are factual disputes relevant to the claims of immunity. *Martin v. Bd. Of County Comm'rs.* 909 F.2d 402 405 (10th Cir. 1990).

Here, plaintiffs claim that defendant Eicher violated IDEA in his individual and official capacities by denying plaintiffs R.L. and J.L. a free and appropriate public education. While the Tenth Circuit has recognized that a cause of action under 42 U.S.C. § 1983 is unavailable to enforce IDEA, it has not yet ruled whether IDEA permits individual liability or damage awards. *Padilla v. Sch. Dist. No. 1*, 233 F.3d 1268, 1274 (10th Cir. 2000). Furthermore, the court has not located a Tenth Circuit or Supreme Court decision holding that a school official violates IDEA's obligation to provide a free and appropriate public education if the official suspends a student whom the official believes is not a resident of the district, without first providing the student with a due process hearing. Under the facts of this case, the court does not believe that defendant Eicher should have been on notice that his actions violated clearly established law.

Accordingly, the court amends its September 17, 2002 order, to the extent that the order permitted claims against defendant Eicher in his individual capacity. Defendants' motion for summary judgment is thus granted as to defendant Eicher in his individual capacity. Defendant Eicher remains in the lawsuit to the extent that plaintiffs state a claim against him under IDEA in his official capacity. The court therefore denies defendants' motion to stay pending appeal, leaving a ruling on the status of that appeal to the appellate court.

II. Order

IT IS ORDERED THAT the court's September 17, 2002 Memorandum and Order (Doc. 168) is amended as follows:

Defendants' Motion for Summary Judgment is granted as to plaintiffs' IDEA claim asserted against defendant Eicher in his individual capacity. Plaintiffs' Motion for Partial Summary Judgment is denied as to plaintiffs' IDEA claim asserted against defendant Eicher in his individual capacity.

The final sentence of the opinion is amended to read, "In sum, the only claims that remain for trial are plaintiffs' IDEA claim against defendants U.S.D. # 497 and Eicher, in his official capacity only, and plaintiffs' procedural due process claim against defendant U.S.D. # 497."

IT IS SO ORDERED.

Dated this 1st day of October, 2002 at Kansas City, Kansas.

S/CARLOS MURGUIA
CARLOS MURGUIA
United States District Judge

APPENDIX E – OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS DATED AND DECIDED SEPTEMBER 17, 2002 AND MODIFIED OCTOBER 1, 2002 AND OCTOBER 4, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

FILED
U.S. DISTRICT COURT
DISTRICT OF KANSAS
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RALPH L. DELOACH
CLERK
BY____________DEPUTY
AT KANSAS CITY, KS

D.L., INDIVIDUALLY)
AND AS NEXT FRIEND)
OF J.L., R.L., MINORS,)
Plaintiffs,)
) CIVIL ACTION
) No. 00-2439-CM
v.)
)
)
THE UNIFIED SCHOOL)
DISTRICT # 497, AND)
DR. DOUGLAS EICHER,)
School Administrator,)
Individually and)
in His Official Capacity,)
Defendants.)

MEMORANDUM AND ORDER

Pending before the court are plaintiffs' Motion to Stay (Doc. 115), defendants' Conditional Motion to Stay (Doc. 130), defendants' Motion to Dismiss Complaint (Doc. 66), plaintiffs' Motion to File Supplement to Final Witness and Exhibit List (Doc. 165), defendants' Motion to Strike Certain Exhibits Submitted in Support of Plaintiffs' Motion for Partial Summary Judgment (Doc. 118), defendants' Motion to Strike Affidavit of Cindy

Harvel (Doc. 157), defendants' Motion to Strike and Preclude Testimony of Witnesses Not Previously Disclosed (Doc. 57), plaintiffs' Motion to Exclude Expert Testimony (Doc. 155), defendants' Motion for Review of Magistrate's Decision on Defendants' Motion for Protective Order Regarding Plaintiffs' Rule 30(b)(6) Notice (Doc. 119), plaintiffs' Motion to Compel Answers to Plaintiffs' First Interrogatories and First Request for Production (Doc. 149), defendants' Application for Stay of Magistrate Judge's Order (Doc. 128), defendants' Motion for Summary Judgment (Doc. 90), and plaintiffs' Motion for Partial Summary Judgment (Doc. 107).

As set forth below, plaintiffs' Motion to Stay (Doc. 115) is denied as moot. Defendants' Conditional Motion to Stay (Doc. 130) is denied. Defendants' Motion to Dismiss Complaint (Doc. 66) is granted in part and denied in part. Plaintiffs' Motion to File Supplement to Final Witness and Exhibit List (Doc. 167) is denied. Defendants' Motion to Strike Certain Exhibits Submitted in Support of Plaintiffs' Motion for Partial Summary Judgment (Doc. 118) is granted in part and denied in part. Defendants' Motion to Strike Affidavit of Cindy Harvel (Doc. 157) is denied. Defendants' Motion to Strike and Preclude Testimony of Witnesses Not Previously Disclosed (Doc. 57) is granted in part and denied in part. Plaintiffs' Motion to Exclude Expert Testimony (Doc. 155) is denied. Defendants' Motion for Review of Magistrate's Decision on Defendants' Motion for Protective Order Regarding Plaintiffs' Rule 30(b)(6) Notice (Doc. 119) is denied. Plaintiffs' Motion to Compel Answers to Plaintiffs' First Interrogatories and First Request for Production (Doc. 149) is granted. Defendants' Application for Stay of Magistrate Judge's Order (Doc. 128) is denied. Defendants' Motion for Summary Judgment (Doc. 90) is granted in part and denied in part. Plaintiffs' Motion for Partial Summary Judgment (Doc. 107) is granted in part and denied in part.

I. Defendants' Conditional Motion to Stay (Doc. 130)

In their Conditional Motion to Stay, defendants request the court to stay all proceedings in this case (hereinafter "the federal court action") pending resolution of a related case, No. 01-2448, styled *Unified School District # 497 v. D.L.*, in Kansas state court (hereinafter "the state court action"). Defendants argue that this court should stay the case pursuant to *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, (1941) and *Colorado River Water Conservation District v. United States*, 424 U.S. 800, (1976). For the reasons set forth below, defendants' Conditional Motion to Stay is denied.

A. Background[1]

Plaintiffs R.L. and J.L. are the minor children of plaintiff D.L. R.L. is autistic and J.L. has a milder learning disability. P.P. cohabitates with D.L., but P.P. has no legal relationship to either D.L. or the children. This case arises from plaintiffs' allegations that defendants Unified School District # 497 (hereinafter "defendant U.S.D. # 497") and Dr. Douglas Eicher, a U.S.D # 497 administrator, failed to provide plaintiffs with access to educational services to which they were entitled. Furthermore, plaintiffs contend defendants improperly disclosed confidential information concerning the plaintiffs. Plaintiffs assert causes of action under the

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[1] The court will set forth the complete factual background later in the opinion. At this point, the court presents only those facts necessary to rule on defendants' Motion to Stay.

Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.;* Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794; the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.;*[2] the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution pursuant to 42 U.S.C. § 1983; and Kansas state law for invasion of privacy.[3]

B. Procedural History

On April 18, 2000, defendant U.S.D. # 497 filed a lawsuit against D.L. and P.P. in the District Court of Douglas County, Kansas. In its state court petition, defendant U.S.D. # 497 brought a state law fraud claim and sought a declaratory judgment pursuant to Kansas state law. The petition alleged that D.L.'s children were not residents of defendant U.S.D. # 497, and sought to enjoin the children's attendance of schools in the district. The petition further stated that D.L. had fraudulently enrolled her children in defendant U.S.D. # 497 and that P.P. aided and abetted that fraud. The defendants in the state court action, D.L. and P.P., did not raise counterclaims in that action. Rather, on September 29, 2000, D.L., individually and on behalf of her minor children, along with P.P., filed the instant federal court action against defendants, asserting federal statutory and constitutional claims and a state law claim for invasion of privacy. On September 7, 2001, D.L. and P.P., defendants in the state court action, filed a Notice of Removal of that action to this court. After finding that removal was improper, this court remanded that action, Case No. 01-2448, styled *Unified School District No. 497 v. D.L.*, to the District Court of Douglas County, Kansas on May 30, 2002.[4] Having discussed the relevant procedural history, the court turns to the merits of defendants' Conditional Motion to Stay.

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[2] In a letter dated June 18, 2002, plaintiffs informed the court that they were withdrawing their claim for punitive damages under Title II of the ADA, in light of the United States Supreme Court's holding in *Barnes v. Gorman*, 536 U.S. 181 (2002), that punitive damages are not available under Title II of the ADA.

[3] Plaintiffs initially brought a claim pursuant to the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g. In a letter dated June 20, 2002, plaintiffs informed the court that they were withdrawing "that portion of their § 1983 claim which was based on the defendants' violation of F.E.R.P.A.," in light of the United States Supreme Court's holding in *Gonzaga University v. Doe*, 536 U.S. 273 (2002) that FERPA does not create a private right of action. The court thus considers plaintiffs' FERPA claim withdrawn in its entirety.

II. Motion to Stay

In their motion, defendants assert two bases upon which this court should abstain from ruling on the present case. First, defendants contend plaintiffs' claims are related to the pending parallel action in Kansas state court, and that, as a result, the federal constitutional issues in this action could be mooted by the state court's determination of Kansas state law--namely, the issue of whether the children reside within the boundaries of defendant U.S.D. # 497 pursuant to Kan. Stat. Ann. § 72-1046. Second, defendants allege that abstention is proper under the *Colorado River* doctrine, because the Kansas state court action is a parallel proceeding and "considerations of 'wise administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation,' "*Colorado River*, 424 U.S at 817 (internal citation omitted), counsel in favor of staying the federal court action.

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[4] Because the court remanded Case No. 01-2448-CM to state court, plaintiffs' Motion to Stay the Proceedings in U.S. District Court Case No. 01-2448-CM, or in the Alternative to Consolidate Case No. 01- 2448-CM with the Instant Action (Doc. 115), is hereby denied as moot.

The court construes defendants' first argument under the abstention doctrine established in *Railroad Commission of Texas v. Pullman Co.* Although defendants label this argument as under the "first prong of the *Colorado River* doctrine" (Def.'s Mot. at 6), the language defendants cite from the *Colorado River* opinion upon which their argument is based is the Supreme Court's discussion of its prior rulings in *Pullman* and other cases that "[a]bstention is appropriate 'in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law.' " *Colorado River*, 424 U.S at 814 (citing *Pullman, inter alia*).

A. *Pullman* Abstention

The *Pullman* doctrine "permits a federal court to stay its hand in those instances where a federal constitutional claim is premised on an unsettled question of state law, whose determination by the state court might avoid or modify the constitutional issue." *Vinyard v. King*, 655 F.2d 1016, 1018 (10th Cir. 1981)(citing *Pullman*, 312 U.S. 496 (1941)). "Where resolution of the federal constitutional question is dependent upon, or may be materially altered by, the determination of an uncertain issue of state law, abstention may be proper in order to avoid unnecessary friction in federal-state relations, interference with important state functions, tentative decisions on questions of state law, and premature constitutional adjudication." *Harman v. Forssenius*, 380 U.S. 528, 534(1965). Abstention is "an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it," and "can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to State court would clearly serve a countervailing interest." *Allegheny County v. Frank Mashuda Co.*, 360 U.S. 185, 188-89 (1959). *Pullman* provides that a district court should abstain if three conditions are satisfied: (1) an uncertain issue of state law underlies the federal constitutional claim; (2) the state issues are amenable to interpretation by the state courts and such an interpretation would moot or substantially narrow the scope of the constitutional claim; and (3) an erroneous interpretation of the state law by the federal court would hinder important state law policies. *Vinyard*, 655 F.2d at 1018 (citing *D'Iorio v. Del. County*, 592 F.2d 681, 686 (3d Cir. 1978)).

First, the court must examine whether an unsettled issue of state law underlies plaintiffs' constitutional claims in this action. Defendants request the court to enter an order staying the federal court action so that the state court may first interpret the Kansas law regarding residency for school attendance purposes under Kan. Stat. Ann. § 72-1046.[5] Defendants contend that the application of § 72-1046 is an unsettled question of state law because no Kansas state appellate court has interpreted the statute, even though the Tenth Circuit and the District of Kansas have examined it.

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[5] This statute provides, in relevant part, that "(a) Any child who has attained the age of eligibility for school attendance may attend school in the district in which the child lives if (1) the child lives with a resident of the district and the resident is the parent, or a person acting as parent, of the child; ..." Kan. Stat. Ann. § 72-1046. One of defendants' defenses in this case is that the plaintiff children were not residents of defendant U.S.D. # 497. Plaintiffs, on the other hand, contend that the children resided in Douglas County and were therefore entitled to an education by defendant U.S.D. # 497. The same issue of residency is also before the state court, because that action includes a claim by defendant U.S.D. # 497 against plaintiffs, alleging that they fraudulently represented that they were residents of Douglas County.

To determine whether abstention is proper, the court must examine whether § 72-1046 presents an issue of uncertain state law.

> [T]he doctrine of abstention "contemplates that deference to state court adjudication only be made where the issue of state law is uncertain." Where, on the other hand, it cannot be fairly concluded that the underlying state statute is susceptible of an interpretation that might avoid the necessity for constitutional adjudication, abstention would amount to shirking the solemn responsibility of the federal courts to "guard, enforce, and protect every right granted or secured by the constitution of the United States."

Kusper v. Pontikes, 414 U.S. 51, 54 (1973)(citations omitted).

The Tenth Circuit has held that a state law is not unclear for purposes of *Pullman* abstention if the legal standard is not unsettled and the court's task merely is to apply the law to a novel set of facts. *See Vinyard*, 655 F.2d at 1019-20. In *Vinyard*, the Tenth Circuit held that the district court erred by abstaining to allow the state court to determine whether, under Oklahoma law, the plaintiff had a property interest in continued employment arising from an implied year-to-year contract with her employer. The Tenth Circuit determined that the state law was not so unclear as to permit abstention.

In reversing the district court, the Tenth Circuit stated that "the difficulty in determining the state law issue before the court 'exist[ed] not because of an unclear standard, but because the precise set of facts posed here [had] not been addressed by the Oklahoma Supreme Court.' " *Id.* at 1019. The court emphasized that it "[did] not in any way minimize how difficult it may be to apply the law to the facts," but held that abstention was inappropriate on that basis, stating that "under such circumstances the district court may not abdicate its duty to adjudicate the matter." *Id.* (citations omitted).

In light of this guidance from the Tenth Circuit, this court believes that the Kansas law regarding residency of children for school attendance is not unsettled. Although there are no Kansas Supreme Court or Kansas Court of Appeals decisions specifically interpreting § 72-1046, there is authority supporting a conclusion that, under the statute, a child's residence for school attendance purposes is determined by the residence of the child's parent or a person acting as the parent. *See* Kan. Att'y Gen. Op. 97-60 (1997), 1997 WL 369371, at *3 ("The residence of a child for the purpose of determining where a child is able to attend school is determined by the location of the residence of the parent, or person acting as parent, of the child, rather than by the location where the child physically lives.") (citing Kan. Stat. Ann. § 72-1046). Another opinion of the Kansas Attorney General confirms that when a child lives with his or her parents, the parents' residence determines the child's residence for school attendance purposes; when a child does not live with his or her parents, the residence of the person acting in some capacity as the child's guardian determines the child's residence for school attendance purposes. *See* Kan. Att'y Gen. Op. 94-3 (1994), at *3.[6] Although an opinion of the Attorney General is neither conclusive nor binding on Kansas courts, it may be persuasive authority. *See In re Lietz Constr. Co.*, 273 Kan. 890, 902 (2002)(citation omitted).]

Further, the Tenth Circuit and District of Kansas opinions interpreting § 72-1046 have mirrored the Attorney General's opinions. In *Joshua W. v. Board of Education*, 13 F.Supp.2d 1199 (D.Kan. 1998)(Marten, J.), *aff'd,*211 F.3d 1278, 2000 WL 525904 (10th Cir. 2000), *cert. denied,* 531 U.S. 1071 (2001), the district court granted summary judgment to the defendant school district on plaintiffs' IDEA claim, finding that IDEA did not obligate the district to provide a free and appropriate public education to plaintiff Joshua W. because he had ceased to become a resident of the district when both of his parents moved out of the district. *Id.* at 1203-05. The district court found that, pursuant to § 72-1046, plaintiff Joshua W. was not a resident of the defendant school district, because he "was neither living in or physically present in the District ... and was not living with a parent or person acting as a parent in the District." *Id.* at 1203-

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[6] The opinion provides, "[u]pon review of Kan. Stat. Ann § 72-1046 and § 72-1111, it is clear that the residence of a pupil for the purpose of attending school is not limited to the residence of the parents. *See Mariadahl Children's Home v. Bellegarde Sch. Dist. No. 23*, 163 Kan. 49, 52 (1947).... Rather, in those instances in which a pupil does not reside with parents, the residence of the pupil will be deemed to be: (1) the residence of the conservator or guardian; (2) ... of the person who is liable by law to maintain, care for, or support the pupil; (3) the residence of the person who has actual care and control of the pupil and is contributing the major portion of the cost of support of the pupil; (4) the residence of the person who has legal custody of the pupil; or (5) the residence of the person who has been granted custody of the pupil by a court of competent jurisdiction." Kan. Att'y Gen. Op. 94-3 (1994), at *3.

04. In addition, the district court rejected plaintiffs' assertion that plaintiff Joshua W. was a resident of the district because he had lived in the district with his sister, noting that the sister had not been a "person acting as a parent" under the statute. *Id.* at 1204.

The Tenth Circuit affirmed, holding that "[u]nder Kansas law, residency with a parent who lives within the jurisdiction of the school district controls which school district is responsible for providing the free appropriate public education [under IDEA]." 211 F.3d 1278, 2000 WL 525904, at *2 (10th Cir.2000) (citing § 72-1046).[7] Even though Kansas courts would not be bound to apply the decisions of federal courts interpreting state law, a state court likely would give at least some weight to the federal courts' interpretation of § 72-1046 in *Joshua W.*[8]

Moreover, in contexts outside the issue of residency for school attendance purposes, there is a long line of Kansas cases holding that a child's domicile is that of his or her parents. *See, e.g., In re Robben,* 188 Kan. 217, 220, 362 P.2d 29, 31-32 (1961). Further, the court does not believe that the language of § 72-1046 is unclear or ambiguous on its face. Even if the court must look to the residency of the children's mother pursuant to § 77-201(23), in order to determine the children's residency, the court does not believe the state of Kansas law regarding that statute is so unclear as to warrant abstention.

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[7] The court cites *Joshua W.* and other unpublished opinions of the Tenth Circuit pursuant to Tenth Circuit Rule 83.1.

[8] This court also finds it significant that neither the Tenth Circuit nor the district court in *Joshua W.* found the state of the law regarding §72-1046 to be so unsettled as to merit certification of the question to the Kansas Supreme Court. Although there is no indication in either opinion that the parties requested certification, federal courts have the power to certify questions of state law to the Kansas Supreme Court *sua sponte*. *See* Kan. Stat. Ann. § 60-3201 (1994)(providing certification procedure); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 76 (1997)

Because the court does not believe that Kansas law is unsettled regarding § 72-1046, the court finds that the first element required for *Pullman* abstention in this case is lacking. Even if the second element required for *Pullman* abstention were present, that a state court's interpretation of the issue could moot or substantially narrow the constitutional issues before this court, defendants have not attempted to establish the third element, that an erroneous interpretation by this court would hinder important state law policies. Accordingly, the court denies defendants' Conditional Motion to Stay to the extent it is based on *Pullman* abstention.

B. *Colorado River* Abstention

Defendants also argue that the court should stay its decision in this case pursuant to the *Colorado River* doctrine. *Colorado River* recognized that concerns regarding judicial economy may warrant deferral of a federal suit when pending state litigation will resolve the issues presented in the federal case. 424 U.S. at 816-818. Because the doctrine "springs from the desire for judicial economy, rather than from constitutional concerns about federal-state comity," and "is an exception to our jurisdictional mandate from Congress," it "may only be used when 'the clearest of justifications ... warrant[s] dismissal.' Thus, while *Colorado River* 's judicial economy goals allow a federal court to avoid the 'virtually unflagging obligation ... to exercise the jurisdiction given [it],' the appropriate circumstances for deferral under the *Colorado River* doctrine are 'considerably more limited than the circumstances appropriate for abstention' and must be 'exceptional.'

"*Reinardt v. Kelly*, 154 F.3d 1296, 1303 (10th Cir. 1999)(quoting *Colorado River*, 424 U.S. at 817-19).

To determine whether deferral is appropriate under *Colorado River,* the court must first examine "whether the state and federal proceedings are parallel." *Allen v. Bd. Of Educ.*, 68 F.3d 401, 402 (10th Cir. 1995). "'Suits are parallel if substantially the same parties litigate substantially the same issues in different forums.' The court should 'examine the state proceedings *as they actually exist* to determine whether they are parallel to the federal proceedings,' resolving any doubt 'in favor of exercising federal jurisdiction.' "*Id.* at 403 (quoting *Fox v. Maulding*, 16 F.3d 1079, 1082 (10th Cir. 1994)).

Here, the parties in the federal and state court actions are "substantially the same." In the federal court action, D.L., her two minor children, R.L. and J.L., and P.P., who resides with D.L., bring several claims against defendants U.S.D. # 497 and Eicher, individually and in his official capacity. In the state court action, defendant U.S.D. # 497 brings a claim against D.L. and P.P. for fraud.

Regarding whether "substantially the same" issues are being litigated in both suits, the court finds that the issue of whether the children resided within defendant U.S.D. # 497 is common to both the federal and state actions. However, any parallelism between the two actions relates only to the question of residency. In the federal action, plaintiffs allege several statutory and constitutional causes of action that are not present in the state action, whereas the state court action encompasses fraud claims based on Kansas state law.

Whether there is enough overlap between the cases to warrant a finding that they are "parallel" is unclear. However, given the Tenth Circuit's guidance that the court must resolve all doubts in favor of the exercise of federal jurisdiction, the court finds that the federal and state actions are not parallel. Although the issue of residency is common to both cases, the causes of action and issues raised differ significantly in the federal and state actions.

Even if the actions were parallel within the meaning of *Colorado River,* the court finds that this case lacks the "exceptional circumstances" which must be present for abstention. To determine whether dismissal or an entry of stay is appropriate, a district court should consider the following factors:

> (1) [W]hether either court assumed jurisdiction over property; (2) whether the federal forum is inconvenient to the parties; (3) the avoidance of piecemeal litigation; (4) the order in which the courts obtained jurisdiction; (5) which forum's substantive law governs the merits of the litigation; and (6) the adequacy of the state forum to protect the rights of the parties.

Joseph Stowers Painting,Inc. v. A. Zahner Co., No. Civ. A. 99-2391-KHV, 2000 WL 210219, at *1 (D.Kan. Feb. 4, 2000) (citing *Colorado River*, 424 U.S. 819; *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 23, 26 (1983)). The test should be applied in a pragmatic, flexible manner. *Shadwick v. Butler Nat'l Corp*, 950 F.Supp. 302, 304 (D. Kan. 1996). No single factor is determinative, and "[o]nly the clearest of justifications will warrant dismissal." *Colorado River*, 424 U.S. at 818-891.

In the case at bar, the first factor is inapplicable because neither court has assumed jurisdiction over property. With regard to the second factor, the court concludes that litigating the federal action in Kansas City, Kansas, as opposed to Lawrence, Kansas, the venue for the state action, would pose only a slight inconvenience to the parties, if any. The third factor, the desirability of avoiding piecemeal litigation, weighs only slightly in favor of abstention. If the court denies the motion to stay, the parties will continue to litigate the same factual and legal issues regarding residency in both courts, risking inconsistent results and undermining judicial economy as to that issue.

However, the federal and state actions involve several claims that do not overlap, and this court ultimately will rule on the constitutional and statutory claims regardless of when and how the state court determines the residency issue. That plaintiffs' federal claims may remain even after the residency issue is determined weighs against a finding that a stay would avoid piecemeal litigation. *Moses H. Cone*, 460 U.S. at 28 (finding that a stay under *Colorado River* "necessarily contemplates that the federal court will have nothing further to do in resolving any substantive part of the case");*Waddell & Reed Fin., Inc. v. Torchmark Corp*, 180 F.Supp.2d 1235, 1242 (D.Kan. 2001).

Regarding the fourth factor, the court notes that the defendants in this action filed the state court action approximately five months prior to the date in which plaintiffs filed the instant action in federal court. However, courts should not measure priority "exclusively by which complaint was filed first, but rather in terms of how much progress has been made in the two actions." *Moses H. Cone*, 460 U.S. at 21-22. In this federal court action, discovery has closed, and the parties have fully briefed their motions for summary judgment, while the court has learned that the state court action has not progressed to a similar degree.

Finally, upon consideration of the fifth factor, whether state or federal law governs the merits of the litigation, the court determines that Kansas state law will apply to the residency issue, while plaintiffs' constitutional and statutory claims arise under federal law. With respect to the sixth factor, the court notes that state courts are entrusted with jurisdiction to hear plaintiffs' federal statutory and constitutional claims.

Applying these factors, the court finds that the "exceptional circumstances" which must exist for an entry of stay are lacking. The judicial economy concerns raised by the pendency of the residency issue in both the state and federal court actions are not so substantial as to weigh against the court's "unflagging obligation" to exercise its jurisdiction. Defendants' Conditional Motion to Stay is denied. As such, the court turns to the merits of the additional motions pending before the court.

III. Defendants' Motion to Dismiss Complaint (Doc. 66)

Defendants request the court to enter an order, pursuant to District of Kansas Rule 16.2(d), dismissing plaintiffs' complaint for failure to act in good faith in preparing the parties' joint pretrial order. As set forth below, defendants' motion is granted in part and denied in part.

District of Kansas Rule 16.2(d) provides that if counsel "fail[s] to appear at the pretrial conference or fail[s] to comply in good faith with the provisions of the rule, the court may, in its discretion, enter a judgment of dismissal or default." In the alternative, or in addition to dismissal, the court may impose any sanction provided for in Federal Rule of Civil Procedure 16(f) or District of Kansas Rule 11.1. D. Kan. R. 16.2(d). That rule incorporates D. Kan. R. 11.1(b)(4), which authorizes the court to order that costs, including attorney's fees, may be imposed against any party, or its attorney, who has failed to comply with a local rule. In considering whether to award sanctions, the court "may consider whether a party's failure was substantially justified or whether other circumstances make the imposition of sanctions inappropriate." D. Kan. R. 11.1(c).

The Scheduling Order of the court required the parties to submit a joint pretrial order no later than February 25, 2002. Defendants state that they contacted plaintiffs' counsel through two telephone calls and one faxed letter to request that plaintiffs submit their drafting contributions to the order by February 21, 2002, so that the parties could finalize the order before the deadline. Defendants further contend plaintiffs' counsel did not provide plaintiffs' contribution to the pretrial order by February 21, 2002, or by the date upon which the pretrial order was due, February 25, 2002. Defendants' attorneys submitted the pretrial order without plaintiffs' drafting contributions.

Plaintiffs respond by stating that plaintiffs' counsel was involved in trial preparation in another case during the week the pretrial order was due, and that he was involved in trial preparation for his own divorce trial, which was scheduled to commence February 25, 2002. Plaintiffs' counsel states he does not recall receiving either telephone message or the faxed letter from defendants' counsel. Plaintiffs' counsel states he spoke with W. Joseph Hatley, counsel for defendants, by telephone on February 25, 2002, and Mr. Hatley did not mention the proposed pretrial order. Plaintiffs claim that defendants' counsel "made virtually no effort" to communicate, stating that "a single faxed letter and two telephone messages" did not constitute "a good faith effort to converse, confer, compare views, consult, and deliberate."

The court finds that dismissal of the complaint would be an unduly harsh sanction under these circumstances. However, the court also finds that plaintiffs' counsel's conduct in failing to confer with defendants in order to submit a joint proposed pretrial order by the deadline merits some sanction by the court. Even if plaintiffs' counsel did not receive the communications from defendants' counsel regarding the deadline, plaintiffs' counsel should have contacted defendants' counsel upon his own accord, to ensure that the parties were able to work together on the proposed pretrial order before the deadline. The court understands that counsel may, at times, become overwhelmed by other obligations. In such circumstances, counsel should request an extension of time to comply with a deadline. In this case, however, plaintiffs' counsel sought no such extension. As a result, defendants' counsel was required to prepare the entire proposed pretrial order, and the parties had not conferred to create a workable joint pretrial order prior to the pretrial conference.

The court does not believe that plaintiffs have shown they attempted in good faith to comply with D. Kan. R. 16.2. Further, plaintiffs have not shown that their failure to comply with the court's order was "substantially justified" or that other circumstances would render the imposition of sanctions inappropriate pursuant to D. Kan. R. 11.1. Consequently, the court sanctions plaintiffs pursuant to D. Kan. R. 11.1(b)(4) and 16.2(d). Plaintiffs are hereby ordered to pay the defendants' attorney's fees incurred in drafting plaintiffs' portion of the pretrial order. Further, plaintiffs are ordered to pay the attorney's fees incurred by defendants in drafting the instant Motion to Dismiss Complaint. Defendants are ordered to submit a

Statement of Attorneys' Fees and costs to the court by September 26, 2002. Having determined that dismissal of the complaint is not warranted, the court turns to the pending evidentiary motions.

IV. Plaintiffs' Motion to File Supplement to Final Witness and Exhibit List (Doc. 165)

Defendants move to strike from plaintiffs' Motion for Partial Summary Judgment the affidavit of Kathleen Urbom. Defendants seek to strike Ms. Urbom's affidavit on the grounds that plaintiffs failed to identify Ms. Urbom as a witness, either in their Initial Disclosures, their Final Witness and Exhibit List, or their Answers to First Interrogatories to Plaintiff D.L.[9] Defendants point out that plaintiffs knew that Ms. Urbom was someone who could be a potential witness in the case, because she was plaintiffs' attorney in late 1999 and early 2000. Defendants contend that Ms. Urbom's affidavit will not be admissible evidence at trial, because plaintiffs have never identified Ms. Urbom as a witness whom they expected to call at trial, either in their initial disclosures or in their Final Witness and Exhibit List filed on or about February 1, 2001.

In their reply, plaintiffs state that the purpose of Ms. Urbom's affidavit is to address defendants' assertion that plaintiffs failed to exhaust their administrative remedies prior to filing suit. Plaintiffs contend that they should be able to offer Ms. Urbom as a witness, because defendants did not raise the issue of exhaustion of administrative remedies until the pretrial conference, and Ms. Urbom would testify as to whether plaintiffs exhausted their administrative remedies. Further, plaintiffs state defendants would not be prejudiced by Ms. Urbom's testimony.

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[9] After defendants filed their motion to strike, plaintiffs filed the instant motion for leave of the court to supplement their Final Witness List to include Ms. Urbom. After addressing the merits of plaintiffs' Motion to File Supplement to Final Witness and Exhibit List, the court will address defendants' Motion to Strike.

In their Motion to File Supplement to Final Witness and Exhibit List, plaintiffs claim Ms. Urbom's testimony "was not known to be relevant to the plaintiffs at the time their Witness and Exhibit list was filed," and that defendants would not be prejudiced by their delay. Plaintiffs further claim, without analysis, that they will be "severely prejudiced" if they are not allowed to supplement their final witness list to include Ms. Urbom's testimony.

The pretrial order in this case provides that no witness who is not listed on the parties' Final Witness List will be permitted to testify absent leave of the court. (Pretrial Order at 21). A final pretrial order shall be modified "only to prevent manifest injustice." Fed.R.Civ.P. 16(e). To determine whether a witness who was not included in the final pretrial order should be permitted to testify, a district court should consider:

> (1)[T]he prejudice or surprise in fact of the party against whom the excluded witnesses would have testified; (2) the ability of that party to cure the prejudice, (3) the extent to which waiver of the rule against calling unlisted witnesses would disrupt the orderly and efficient trial of the case or of other cases in the court; and (4) bad faith or willfulness in failing to comply with the court's order.

Roberts v. Roadway Express, Inc., 149 F.3d 1098, 1108

(10th Cir. 1998)(citing *Smith v. Ford Motor Co.*, 626 F.2d 784, 797 (10th Cir. 1980)).

Applying this test, the court does not believe plaintiffs have shown that modification of the pretrial order is necessary to prevent manifest injustice. Regarding the first factor, the degree of prejudice defendants would face, the court recognizes that defendants would incur prejudice by being required to depose Ms. Urbom and conduct related discovery less than one month from trial. At the same time, the court is not persuaded by defendants' argument that they would incur prejudice if Mr. Hatley would testify in order to rebut Ms. Urbom's testimony. In determining whether to modify the pretrial order, the court must be guided not by concerns due to the prejudice that would occur to defendants from the fact of Ms. Urbom's appearance as a witness, but rather by the prejudice defendants would incur due to the untimeliness of plaintiffs' request to include her.

Regarding the second and third factors, the court recognizes that defendants could cure the prejudice they would incur through an extension of time so that they could depose Ms. Urbom. As set forth later in the opinion, however, plaintiffs also have sought to introduce at trial the testimony of 31 witnesses who were not previously disclosed. While the impact of an extension of a deadline and time for related discovery may not be significant as to any one witness, the court believes that the cumulative impact of discovery for all of these witnesses would significantly disrupt the order and efficiency of the litigation. Thus, the second and third factors weigh against allowing Ms. Urbom to testify at trial.

With respect to the fourth factor, although plaintiffs had knowledge that Ms. Urbom was a potential witness in the case, they did not list her in their initial disclosures or in any other discovery documents. The court does not believe this is by itself indicia of bad faith or willful noncompliance on the part of plaintiffs. Further, plaintiffs' argument that Ms. Urbom's testimony is needed to address whether plaintiffs exhausted their administrative remedies is not persuasive. The court was able to fully analyze this issue without Ms. Urbom's affidavit, because the affidavit repeated facts that already were part of the record. Accordingly, the court denies plaintiffs' Motion to File Supplement to Final Witness and Exhibit List, and turns to defendants' Motion to Strike.

V. Defendants' Motion to Strike Certain Exhibits Submitted in Support of Plaintiffs' Motion for Partial Summary Judgment (Doc. 118)

Defendants move the court for an order striking Exhibits 21 (*Lawrence Journal-World* article dated January 31, 2001), 22 (Affidavit of Kathleen R. Urbom, former attorney for the plaintiffs), and 25 (*Lawrence Journal-World* article dated April 20, 2000) from the exhibits submitted in support of Plaintiffs' Motion for Summary Judgment. Defendants also request the court to strike three statements from the affidavit of plaintiff D.L. As set forth below, defendants' motion is granted in part and denied in part.

A. Motion to Strike *Lawrence Journal-World* Articles

Defendants move to strike Exhibits 21 and 25, articles that appeared in the *Lawrence Journal-World*, on the grounds that the articles are unauthenticated and are hearsay. Specifically, defendants contend the articles consist of the out-of-court statements of the reporters who authored the articles, and are being offered for the truth of their contents. Plaintiffs have neither deposed the reporters who wrote the articles, nor provided their affidavits to the court.

Federal Rule of Civil Procedure 56(e) provides that affidavits supporting and opposing motions for summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Federal Rule of Evidence 801 holds that hearsay, i.e., an out-of-court statement offered for its truth, is not admissible. Plaintiffs contend that the articles are not hearsay, because they are not offered for their truth. Rather, plaintiffs argue the articles are offered to show the mere fact that they were published.

The first article, Exhibit 21, is attached to support plaintiffs' Fact 110, which provides that "[s]hortly after the lawsuit was filed on April 20, 2000, an article appeared in the Lawrence Journal World discussing the suit." The court finds that Exhibit 21 is not hearsay because it is not being offered to prove that the contents of the article are true; rather, plaintiffs seek to introduce the article merely to show that it was published. Exhibit 21 thus falls outside the definition of hearsay, and is admissible to prove that it was published. Further, pursuant to Federal Rule of Evidence 902(6), newspaper articles are "self-authenticating." Extrinsic evidence of authenticity as a condition precedent to the admissibility of evidence is not required for printed materials purporting to be newspapers or periodicals. Accordingly, the court finds plaintiffs are not required to provide authentication in order to determine the admissibility of the newspaper articles. Fed.R.Evid. 902(6). Exhibit 21 is admissible to show the fact of publication, and may be considered on summary judgment.

The second article, Exhibit 25, is attached to support plaintiffs' Facts 113 and 114. Fact 113 provides that Joe Nyre, an official for defendant U.S.D. # 497, stated that the U.S.D. # 497 "could increase Medicaid funding by $855,000 annually if U.S.D. # 497 sought Medicaid Reimbursement for all its eligible special education students." Fact 114 states that Mr. Nyre "also stated that the money received from Medicaid would be used to buy equipment for students with disabilities or to improve training for special education teachers." Plaintiffs argue that the articles are not hearsay because they are not being offered to prove the truth of the matters contained in the articles, but rather to show the fact they were published.

The court finds that plaintiffs seek to introduce Exhibit 25 for the purpose of proving that Mr. Nyre made the statements contained within it. However, the court finds that Mr. Nyre's statements in the article are not hearsay, because they constitute admissions by a party-opponent, and thus fall outside the hearsay rule pursuant to Federal Rule of Evidence 801(d)(2). Rule 801(d)(2) provides that a statement made by a party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, is not hearsay. As an official for the school district, Mr. Nyre was an agent of defendant U.S.D. # 497. He made his comments during the scope of his duties as a school official, and the statements concerned his conduct as a school official. Accordingly, the court finds Exhibit 25 is admissible.

B. Affidavit of Kathleen Urbom

Defendants move to strike Exhibit 22, the affidavit of Ms. Urbom, on the grounds that plaintiffs failed to identify Ms. Urbom as a witness, either in their

Initial Disclosures, their Final Witness and Exhibit List, or their Answers to First Interrogatories to Plaintiff D.L.

Because the court has denied plaintiffs' motion to modify the pretrial order to include ~~Ms. Urbom~~ as a witness, her testi~~mony will~~ be inadmissible at trial. The court notes that while Federal Rule of Civil Procedure 56(e) requires that affidavits must be supported by admissible evidence, it does not require that affiants be listed as witnesses for trial. *See, e.g., Schmitt v. Beverly Health & Rehab. Services*, 993 F.Supp. 1354, 1359 (D.Kan. 1998); *Taylor v. St. Louis Sw. Ry. Co.*,, 746 F.Supp. 50, 53 (D. Kan. 1990). In their motion to strike the affidavit of Cindy Harvel, which the court will consider later in the opinion, defendants attempt to distinguish *Schmitt* and *Taylor* on the grounds that the affidavits at issue in those cases either were not essential to the court's decision, *Schmitt*, 993 F. Supp. At 1360, or because the party moving to strike would have incurred no prejudice, *Taylor*, 746 F.Supp. at 53. Defendants argue that the court should reject these cases because defendants would incur prejudice in this case if Ms. Urbom and Ms. Harvel's affidavits were admitted. Further, defendants claim that Rule 56(e) limits the testimony that courts may consider upon summary judgment to that of affiants who will also testify at trial.

After having considered defendants' arguments, the court believes that *Schmitt* and *Taylor* are persuasive authority. Rule 56(e) provides that "[s]upporting and opposing affidavits ... shall set forth such facts **as would be admissible in evidence**." The interpretation of Rule 56(e) advanced by the *Schmitt* and *Taylor* courts is supported by the clear language of the rule. Rule 56(e) "focuses on the quality of the information contained in the affidavit and the affiant's relationship to that information, not whether the affiant will be available to testify at trial." *FDIC v. Horn*, 751 F.Supp. 186, 188 n.1

(D.Colo. 1990); *see also Paolello v. Marco*, No. 96-C-2793, 1997 WL 280654 at *4 (N.D.Ill. May 22, 1997 (denying motion to strike affidavit of witness not listed as a potential trial witness). Defendants' motion to strike Ms. Urbom's affidavit for purposes of consideration on summary judgment is denied.

C. Affidavit of D.L.

Defendants move to strike from plaintiff D.L.'s affidavit her statement that the Turner and Piper School Districts requested that she sign certain forms "so that R.L. would be eligible for Medicaid benefits." (Pls.' Mot. Partial Summ. J. Attach. 20). In addition, defendants ask the court to strike plaintiff D.L.'s statement that the school districts "received Medicaid benefits for R.L." during the time in which R.L. was enrolled in defendant U.S.D. # 497.

Defendants object on the basis that plaintiff D.L.'s statements are hearsay and are not based upon her personal knowledge, and are therefore inadmissible under Federal Rule of Civil Procedure 56(e). Specifically, defendants contend that plaintiff D.L.'s statements that "the Turner School District provided me with a Medicaid Consent form and requested that I sign it so that R.L. could be eligible for Medicaid benefits" and that "the Piper Unified School District No. 203 ... also provided me with a Spectra Consent form and requested that I sign it so that R.L. could be eligible for Medicaid benefits" are hearsay because plaintiff D.L. merely repeated information given to her by employees of the Turner and Piper school districts.

The court finds that plaintiff D.L.'s statements are hearsay only to the extent that she states that the officials requested that she sign the forms "so that R.L. could be eligible for Medicaid benefits." That portion of plaintiff

D.L.'s statement contains the alleged out-of-court statement of the school district officials as repeated by plaintiff D.L., and plaintiffs offer the statement to prove the truth of the matter asserted--that the districts sought to make R.L. eligible for Medicaid benefits. However, plaintiff D.L.'s testimony is admissible to the extent she states that the Turner and Piper School District officials provided her with a Medicaid Consent form and the Spectra Consent form; this portion of her testimony does not fall within the definition of hearsay as provided in Federal Rule of Evidence 801.

Second, defendants contend plaintiff D.L. has not shown that her statement that the Turner and Piper districts "received Medicaid benefits for R.L." was based upon sufficient personal knowledge. Defendants claim that only school district officials would have direct personal knowledge whether defendant U.S.D. # 497 received Medicaid benefits, and that any knowledge plaintiff D.L. would have received related to defendant U.S.D. # 497's Medicaid benefits would have come from district employees.

The court agrees with defendants that plaintiffs have failed to show that plaintiff D.L.'s statements that the Turner and Piper School Districts "received Medicaid benefits for R.L." are based upon plaintiff D.L.'s personal knowledge. Accordingly, the statements are inadmissible under Federal Rule of Evidence 602,[10] and may not be considered by the court pursuant to Federal Rule of Civil Procedure 56(e).

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[10] Federal Rule of Evidence 602 provides that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Fed.R.Evid. 602.

Defendants' Motion to Strike Certain Exhibits Submitted in Support of Plaintiff's Motion for Partial Summary Judgment (Doc. 143) is therefore granted in part and denied in part.

VI. Defendants' Motion to Strike Affidavit of Cindy Harvel (Doc. 157)

Defendants also request the court to strike the affidavit of Cindy Harvel from plaintiffs' Reply in support of plaintiffs' Motion for Partial Summary Judgment on the basis that it fails to meet the requirements of Federal Rule of Civil Procedure 56(e). In the alternative, defendants seek to strike the affidavit on the grounds that plaintiffs were not substantially justified in failing to disclose the identity of Ms. Harvel pursuant to Federal Rule of Civil Procedure 26(a). The affidavit provided by Ms. Harvel contains information regarding R.L.'s eligibility for Medicaid. Defendants further claim that Ms. Harvel's testimony, if admitted, would be prejudicial due to the vagueness of the business record Ms. Harvel authenticated. Finally, defendants contend that plaintiffs' submission of the affidavit is sanctionable under Federal Rule of Civil Procedure 37(b)(2), because plaintiffs failed to obey the scheduling order of the court when they failed to identify Ms. Harvel on their final witness list.

First, the court addresses defendants' claim that Ms. Harvel's affidavit is inadmissible under Federal Rule of Civil Procedure 56(e) because Ms. Harvel was not listed on plaintiffs' final witness list. As the court has noted in its discussion of Ms. Urbom, while Federal Rule of Evidence 56(e) requires that affidavits must be supported by admissible evidence, it does not require that affiants be listed as witnesses for trial. *See, e.g.*, *Schmitt*, 993 F.Supp. at 1359; *Taylor*, 746 F.Supp. at 53.

The court thus finds that, although Ms. Harvel is not listed as a trial witness, the court may consider her testimony for summary judgment purposes if it meets the requirements of Rule 56(e). Accordingly, defendants' motion to strike is denied. At the same time, the court recognizes it must counterbalance any prejudice that could occur to defendants through the court's consideration of Ms. Harvel's affidavit. The court thus allows defendants to depose Ms. Harvel, if they choose to do so.

Second, defendants claim that Ms. Harvel's affidavit would be prejudicial to defendants, because the record is vague. The court believes that defendants' argument addresses the persuasive weight of the evidence, rather than its admissibility. Effective cross-examination would mitigate any potential prejudice. Defendants' motion to strike Ms. Harvel's affidavit is denied on this basis.

Third, defendants request the court to impose sanctions upon plaintiffs due to their failure to obey the scheduling order of the court, as provided in Federal Rule of Civil Procedure 37(b)(a)(B), (C), and (D). Specifically, defendants contend plaintiffs violated the court's scheduling order by failing to identify Ms. Harvel as a witness on plaintiffs' final witness list. Defendants also complain that plaintiffs never provided any indication, until after the close of discovery, that they would rely upon plaintiffs R.L. and J.L.'s eligibility to receive Medicaid benefits to support their case-in-chief. Defendants contend that plaintiffs have "sandbagged" this issue by failing to reveal it in their answers to defendants' Interrogatories Nos. 4 and 5, in which plaintiffs purported to state the complete factual basis for their ADA and equal protection claims. Further, defendants argue that plaintiffs' omission of Ms. Harvel from their witness lists was intentional.

Defendants have not shown that plaintiffs' conduct is worthy of sanctions under Federal Rule of Civil Procedure 37 for failure to comply with the court's scheduling order. The court believes plaintiffs have offered a sufficient justification for their failure to previously disclose Ms. Harvel as a potential witness, because Ms. Harvel's testimony is rebuttal evidence. Moreover, the court believes it can mitigate any potential prejudice defendants would incur due to the timing of plaintiffs' disclosure of Ms. Harvel by allowing defendants sufficient time to conduct any needed discovery. Defendants' Motion to Strike Affidavit of Cindy Harvel Submitted in Support of Plaintiffs' Motion for Partial Summary Judgment (Doc. 157) is denied.

VII. Plaintiffs' Motion to Strike and Preclude Testimony of Witnesses Not Previously Disclosed (Doc. 57)

In addition, defendants move the court for an order precluding the use of all witnesses and exhibits listed by plaintiffs in their Final Witness and Exhibit List that have not been previously or properly disclosed. The scheduling order for this case obligated all parties to serve their initial Rule 26 disclosures by October 26, 2001, file and serve their Preliminary Witness and Exhibit Lists by November 30, 2001, and their Final Witness and Exhibit Lists by February 1, 2002. On February 1, 2002, plaintiffs filed a Final Witness and Exhibit List, which included 31 persons who had not been listed in plaintiffs' initial Rule 26 disclosures, or in any of plaintiffs' responses to written discovery requests. Further, plaintiffs listed four witnesses, Diane Lund, M.A., Jackie Springer, M.D., Jan B. Roosa, Ph.D., and Paul Richard Epps, M.D., as witnesses who would testify regarding "the children's disabilities and the impact of the actions of the District on the children." Defendants state they believe plaintiffs are attempting to introduce these witnesses for the purpose of introducing expert testimony, and ask the court to exclude these witnesses because plaintiff did not make expert disclosures prior to the December 31, 2001 deadline. In addition, defendants claim that plaintiffs' Final Witness and Exhibit List also fails to describe sufficiently many of plaintiffs' proposed exhibits. The court will examine each of defendants' objections in turn.

A. Standard

A party must make an initial disclosure of "the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment, identifying the subjects of the information ...." Fed.R.Civ.P. 26(a)(1)(A). Further, a party is under a continuing obligation "to supplement or correct the [Rule 26(a)] disclosure or response to include information thereafter acquired ... if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." Fed.R.Civ.P. 26(e)(1). A court must exclude evidence if a party's failure to disclose information or amend a prior response in accordance with Rule 26 lacks substantial justification and is not harmless. Fed.R.Civ.P. 37(c)(1). Further,

> The determination of whether a Rule 26(a) violation is justified or harmless is entrusted to the broad discretion of the district court. A district court need not make explicit findings concerning the existence of a substantial justification or the harmlessness of a failure to disclose. Nevertheless, the following factors should

> guide its discretion: (1) the prejudice or surprise to the party against whom the testimony is offered; (2) the ability of the party to cure the prejudice; (3) the extent to which introducing such testimony would disrupt the trial; and (4) the moving party's bad faith or willfulness.

Woodworker's Supply, Inc. v. Principal Mut. Life Ins. Co., 170 F.3d 985, 993 (10th Cir. 1999)(citations omitted).

B. Analysis

The court first examines whether plaintiffs failed to disclose information or to supplement their disclosures according to Rule 26. After determining whether plaintiffs failed to comply with the rules, the court will turn to the question of whether such failure was substantially justified.

Plaintiffs included for the first time in their Final Witness and Exhibit List eleven employees or agents of defendants; two investigators with the Office of Civil Rights of the U.S. Department of Education (OCR), who had been corresponding with defendants and conducting an investigation of alleged discrimination by defendants against individuals with disabilities; two reporters from the *Lawrence Journal-World* who wrote several articles about this litigation and with whom defendants gave interviews; Ms. Cynthia Lane, a witness who was not included on either party's lists but was deposed by defendants; four individuals involved with special education programs at the University of Kansas attended by R.L. after school; and four doctors, whom plaintiffs claim are listed not as experts, but as treating physicians exempt from expert disclosure requirements.

Defendants claim plaintiffs were aware of the existence of the witnesses at the time plaintiffs filed their Rule 26(a) Initial Disclosures. Plaintiffs counter that defendants would incur little prejudice because the witnesses in question are individuals about whom defendants had knowledge throughout discovery. The court will examine each of defendants' objections in turn.

1. Current and Former Employees; *Lawrence Journal-World* Reporters; Ms. Cynthia Lane; Special Education Program Officials; OCR Investigators; and Doctors and Therapists

Plaintiffs present no evidence that they were unaware at the time they issued their initial disclosures of the existence of the eleven employees of defendant U.S.D. # 497, the two reporters, Ms. Lane, the four individuals from the special education programs at the University of Kansas, the two investigators from the U.S. Department of Education's Office of Civil Rights (OCR), and the four doctors and therapists at the time plaintiffs issued their initial disclosures. Further, plaintiffs offer no explanation for their failure to supplement their initial disclosures.

Defendants proffer several reasons why plaintiffs' failure to disclose these witnesses violated Rules 26(a) and 26(e). First, defendants point out that the newspaper articles written by the reporters were published in the spring of 2000. In addition, defendants specifically requested in their interrogatories that plaintiffs disclose the identity of any witness whom D.L. claimed had information that would support her invasion of privacy claim. Further, defendants state that plaintiffs knew of the OCR investigation prior to this lawsuit, because plaintiffs instigated the investigation through a complaint to the OCR which was filed on May 11, 2000. Defendants also point out that, at the time of their initial disclosures, plaintiffs knew of the existence of the four treating physicians and therapists who had worked with plaintiffs.

The court thus finds that plaintiffs failed to disclose the eleven current and former employees of defendant U.S.D. # 497, two *Lawrence Journal-World* reporters, Ms. Cynthia Lane, the special education program officials, the two investigators from the OCR, and the four doctors and therapists as required by Federal Rule of Civil Procedure 26(a), or to provide a supplemental disclosure of these witnesses under Rule 26(e).

Next, the court must determine whether plaintiffs' failure to disclose these witnesses was substantially justified. In this case, defendants have shown that plaintiffs had knowledge of these individuals at the time plaintiffs filed their initial disclosures. Plaintiffs offer no cognizable explanation for their failure to include the witnesses at that time. Accordingly, the court finds that plaintiffs' failure to disclose these eleven witnesses at the time of the initial disclosures lacks substantial justification. Plaintiffs' assertion that defendants had knowledge of the existence of the witnesses is simply insufficient to put defendants on notice that these individuals would be potential witnesses in the case. *Accord Barker v. Williams Pipeline Co.*, Civ. A. No. 92-2117, 1993 WL 191335, at *2-3 (D.Kan. May 14, 1993)(striking expert witnesses from plaintiffs' witness list when plaintiff testified his attorneys had been aware of the experts' existence three months prior to their designation).

A party's failure to comply with required disclosures is only harmless when it results in no prejudice to the opposing party. *Hall v. United Parcel Serv.*, No. Civ. A. 99-2467-CM, 2000 WL 554059, at *2 (D.Kan. Apr. 28, 2000). Plaintiffs' failure to make the required disclosures has undermined defendants' ability to conduct discovery as related to these witnesses.

The court finds that plaintiffs' failure to disclose or supplement as to these witnesses lacked substantial justification and was harmful to defendants. Accordingly, the court grants defendants' motion to strike eleven current and former employees of defendant U.S.D. # 497, two *Lawrence Journal-World* reporters, Ms. Cynthia Lane, the special education program officials, the two investigators from the U.S. Department of Education's Office of Civil Rights, and the four doctors and therapists from plaintiffs' Final Witness and Exhibit List.

2. Defendants' Counsel

Defendants' lead counsel, Mr. Hatley, is included as a witness on plaintiffs' Final Witness List. Defendants allege that they would suffer prejudice if Mr. Hatley is required to testify, because he may become unable to represent defendants at trial. Further, defendants contend plaintiffs violated Rule 26(a) by failing to disclose Mr. Hatley as a potential witness earlier in discovery, since plaintiffs had been aware of his existence. Plaintiffs state in their Final Witness List that Mr. Hatley is listed:

> [T]o testify concerning his involvement with plaintiffs concerning the enrollment of R.L. and J.L. in U.S.D. # 497, his communications with the press concerning allegations made by defendants against plaintiffs, his involvement with O.C.R. related to their investigation, his involvement with defendants concerning the decision to initiate a lawsuit against plaintiffs and other matters relevant to this litigation.

(Pls.' Witness & Ex. List at 4).

Courts must exercise "great care" prior to permitting the deposition of an attorney, if the attorney's advice is not an issue in the case. *Kelling v. Bridgestone/Firestone, Inc.*, 153 F.R.D. 170, 171 (D.Kan. 1994). Accordingly, the deposition of opposing counsel is permissible only when (1) no other means exist to obtain the information than to depose opposing counsel, (2) the information sought is relevant and nonprivileged, and (3) the information is crucial to the preparation of the case. *Id.* (citing *Shelton v. Am. Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986)).

In the case at bar, plaintiffs have made no showing that any information Mr. Hatley may have is not discoverable by other means. In fact, plaintiffs do not address the issue of Mr. Hatley's testimony in their Response to defendants' Motion to Strike. Moreover, even assuming that the information Mr. Hatley could disclose is relevant and nonprivileged, plaintiffs have not shown that the information would also be crucial to the preparation of their case. Accordingly, defendants' Motion to Strike is granted as to Mr. Hatley. Mr. Hatley is stricken from plaintiffs' Final Witness List.

5. Matters Not Sufficiently Identified

Defendants' move to strike several discovery requests on the grounds that they are vague or insufficient. The court denies defendants' motion on the basis that defendants have not certified that they have made a reasonable effort to confer with plaintiffs' counsel as required by District of Kansas Rule 37.2.

Defendants' Motion to Strike and Preclude Testimony by Witnesses Not Previously Disclosed and the Use of Exhibits not Properly Disclosed or Identified by Plaintiffs is therefore granted in part and denied in part. The court next examines plaintiffs' Motion to Exclude Expert Testimony.

VIII. Plaintiffs' Motion to Exclude Expert Testimony (Doc. 155)

Plaintiffs have moved the court to exclude the expert testimony and reports of Dr. Jay Chambers. Plaintiffs contend that Dr. Chambers's testimony is not relevant for two reasons. First, plaintiffs claim that Dr. Chambers's analysis of the costs of educating special education students in Kansas is not relevant because undue expense is not a defense to a claim of discrimination under the Rehabilitation Act § 504, unless defendants establish that accommodating plaintiffs would result in an undue financial burden. Second, plaintiffs state that Dr. Chambers's report does not address the additional expenses defendant U.S.D. # 497 would actually incur in educating plaintiffs R.L. and J.L., because the report is based upon a study of the entire state of Kansas.

Defendants contend plaintiffs' assertion that undue expense is not a defense is erroneous, and assert plaintiffs must prove as part of their prima facie case that the accommodation plaintiffs seek--that of modifying defendant U.S.D. # 497's nonresident admissions policy to permit the admission of children with disabilities--is reasonable. "Relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed.R.Evid. 401. Consequently, according to defendants, Dr. Chambers's report is relevant. Further, defendants state that plaintiffs' objection based upon the scope of Dr. Chambers's report impacts upon the weight of the evidence rather than its relevance.

The court finds that Dr. Chambers's report would have a tendency to prove or disprove a fact at issue in the case--the cost defendant U.S.D. # 497 would incur in educating an autistic child. Further, the court believes plaintiffs' objection that Dr. Chambers's study is not particularized as to the burden defendant U.S.D. # 497 would bear addresses the weight of the evidence rather than its admissibility. The court finds Dr. Chambers's expert testimony and report is admissible under Federal Rule of Evidence 401. Plaintiffs' motion is denied.

IX. Defendants' Motion for Review of Magistrate's Decision on Defendants' Motion for Protective Order Regarding Plaintiffs' Rule 30(b)(6) Notice (Doc. 119) and Plaintiffs' Motion to Compel Answers to Plaintiffs' First Interrogatories and First Request for Production (Doc. 137)

Defendants request the court to overrule U.S. Magistrate Judge David J. Waxse's May 3, 2002 order (Doc. 114) which denied defendant's Motion for Protective Order (Doc. 68) regarding a Rule 30(b)(6) deposition notice that was served upon defendants. The May 3, 2002 order denied defendants' motion for protective order, in which defendants sought to prevent plaintiffs from discovering the names and addresses of nonresident students who had been admitted to defendant U.S.D. # 497. In their motion to compel, plaintiffs ask the court to enter an order requiring defendants to answer interrogatories in which plaintiffs requested the names of and information about these students. Defendants also request the court to reverse the May 3, 2002 order to the extent that it required defendants to produce witnesses for deposition when their production would require defendants to produce documents in a shorter timeframe than that allotted by Federal Rule of Civil Procedure 34. Finally, defendants ask the court to review the portion of the May 3, 2002 order in which the court required defendants to comply with plaintiffs' request for discovery related to the defendant U.S.D. # 497's decision to pursue an action against the plaintiffs in state court. As set forth below, the court denies defendants' motion for review of magistrate's order and grants plaintiffs' motion to compel.

A. Standard for Review of Magistrate's Order

Under 28 U.S.C. § 636(b)(1)(A), the district court's scope of review of a magistrate's decision is whether the order has been shown to be "clearly erroneous or contrary to law." *Ocelot Oil Corp. v. Sparrow Indus.* 847 F.2d 1458, 1461-62 (10th Cir. 1998). "The clearly erroneous standard requires that the court affirm the decision of the magistrate unless 'on the entire evidence [the court] is left with a definite and firm conviction that a mistake has been committed.' "*Aerotech Res., Inc. v. Dodson Aviation, Inc.*, No. Civ. A. 00-2099-CM, 2001 WL 474302, at *3 (D.Kan. Apr. 23, 2001 (quoting *Ocelot Oil Corp.*, 847 F.2d at 1461-62)(internal citation omitted); *see also* Fed.R.Civ.P. 72(a); D. Kan. Rules 72.1.1(c) & 72.1.4(a).[11]

B. Confidential Information

First, defendants seek reversal of Judge Waxse's denial of defendant U.S.D. # 497's motion to protect its representatives from being required to respond to plaintiffs' request for information regarding the identity of other nonresident pupils who were enrolled in defendant U.S.D. # 497, and of other parents asked to remove their children from defendant U.S.D. # 497. Defendants object on the grounds that divulging this information could subject defendant U.S.D. # 497 to further litigation under the FERPA, 20 U.S.C. § 1232g. Plaintiffs request the court to enter an order compelling defendants to provide this information.

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[11] Plaintiffs argue that the court cannot review the magistrate's order because defendants never sought reconsideration of the order under District of Kansas Rule 7.3. That rule does not indicate that reconsideration is required prior to a party's seeking review of a magistrate's order, and plaintiffs cite no law to the contrary. The court therefore rejects plaintiffs' argument.

Judge Waxse denied defendants' objection on the grounds that a Department of Education regulation states that an educational institution "may disclose personally identifiable information from an education record of a student without the consent required by § 99.30 if the disclosure ... is to comply with a judicial order or lawfully issued subpoena." 34 C.F.R. § 99.31(a)(9)(i). Judge Waxse thus held that discovery of this information could move forward as long as the parental notice requirements of this regulation were met. Further, Judge Waxse determined that "a Stipulated Protective Order restricting disclosure of the information to the purposes of this litigation only could adequately address the District's concerns" regarding the disclosure of confidential information (Order at 4).

Defendants state that they already have provided information regarding each nonresident student who was admitted to defendant U.S.D. # 497 between 1997 and 2001, but did not provide the names of the students in order to avoid liability under FERPA. Further, defendants claim there is no reason why plaintiffs would need to know the names of the students, and that the relevance of the names is outweighed by the burden defendants would incur in producing them. In defendants' response to plaintiffs' Motion to Compel, defendants state that if the court were to order defendant U.S.D. # 497 to provide this information, it would be required to give advance notice to several hundred students or their parents.

The court finds defendants have failed to show that Judge Waxse's decision denying the protective order was clearly erroneous or contrary to law. The regulation at issue clearly provides that otherwise confidential information may be disclosed pursuant to court order. Furthermore, defendants' argument that the actual names of the students are only marginally irrelevant, whereas the burden of potential liability defendants would face is substantial, is not persuasive. The regulation at issue operates to protect an educational institution from liability by creating an exception to the rule prohibiting disclosure of confidential information regarding students. Furthermore, as the court has noted above, the Supreme Court recently ruled that FERPA does not create a private right of action. *Gonzaga Univ.*, 122 S.Ct. at 2277-79. Defendants have not shown how disclosure of the identifying information would subject them to liability, nor have they shown that the requested production would be unduly burdensome in some other respect. Defendants' motion for review is denied on this basis.

In the same vein, the court grants plaintiffs' motion to compel defendants to provide the names and addresses of the students requested. The court denies plaintiffs' request in their motion to compel for an award of costs and fees associated with the preparation of the motion pursuant to Fed.R.Civ.P. 26, 33, 34 and 37. Defendants' failure to produce the names and addresses is not sanctionable, because defendants simultaneously sought review of Judge Waxse's decision and a stay of the May 3, 2002 order. Defendants are thus ordered to disclose the names and addresses requested by plaintiffs by September 26, 2002.

C. Untimely Request for Documents/ Unreasonable Notice

Defendants seek review of the part of Judge Waxse's order which denied defendants' objection to paragraphs 1, 5, 6, 8-9, and 11 of the Rule 30(b)(6) deposition noticed by plaintiffs. Before Judge Waxse, defendants objected that no witness or witnesses had personal knowledge or memory of the information sought in the requests. Consequently, the only way that a representative of defendants could prepare to testify in deposition on the subjects would be to locate and review documents containing the information. Defendants argue that plaintiffs thus attempted to discover documents well beyond the expiration of the time for serving written discovery requests had passed. Further, defendants contend that plaintiffs attempted to require the production of documents by defendants via the deposition notice on only eight days' notice, which was too little time in light of the effort that would have been required in order to prepare the witnesses to testify on the subjects noticed for deposition.

Judge Waxse denied defendants' argument on the basis that because defendant U.S.D. # 497 had been ordered to respond to plaintiffs' written discovery requests, defendants' argument was "not persuasive." Defendants assert this ruling was clearly erroneous and contrary to law. Specifically, defendants show that the deposition paragraphs requested information that plaintiffs had not previously sought in written discovery requests. Defendants argue that Judge Waxse's ruling enabled plaintiffs to circumvent Federal Rule of Civil Procedure 34, which allows parties 30 days in which to produce documents to an opposing party.

The court finds that Judge Waxse's ruling was not clearly erroneous or contrary to law. Defendants cite no authority for the proposition that a protective order should be entered to prevent the taking of a deposition that would have the effect of being a request for documents absent Rule 34's timing requirements. However, the court recognizes that defendants may require additional time in order to prepare adequately for the noticed depositions. Accordingly, the court orders that the depositions shall not take place until September 26, 2002.

D. Information Regarding Filing of Suit by Defendant U.S.D. # 497 Against Plaintiffs

Finally, defendants seek review of the part of the order which denied defendants' objection to plaintiffs' request that defendant U.S.D. # 497 produce a representative to testify regarding "the person or persons who made the final decision or recommended that the referenced action be filed against [D.L.] or [P.P.] prior to consultation with the School Board and the reasons for instituting this action." Defendants argue that the information sought by plaintiffs is not relevant, because both parties agree that defendant U.S.D. # 497 subsequently ratified the filing of the suit, thus rendering the initial lack of authorization meaningless. Further, defendants claim that plaintiffs failed to meet their burden to justify the need for this information to be discovered.

In response, plaintiffs contend that the information they seek would address defendant Eicher's motives and whether he should be entitled to qualified immunity. Judge Waxse overruled defendant U.S.D. # 497's objection on the grounds that relevance was "apparent" and the defendants' argument with respect to relevance was "not persuasive."

The court finds that Judge Waxse's ruling was not clearly erroneous or contrary to law. "Relevancy is broadly construed at the discovery stage of the litigation and a request for discovery should be considered relevant if there is any possibility that the information sought may be relevant to the subject matter of the action." *Naerebout v. IBP, Inc.*, Civ. A. No. 91-2254-L, 1992 WL 754399, at *1 (D.Kan. Aug. 19, 1992)(citation omitted). Plaintiffs have set forth a sufficient basis for the court to find that the discovery plaintiffs seek could lead to the finding of admissible and relevant evidence, unrelated to the ratification issue. Defendants' motion for review of magistrate's order is denied on this basis. For the same reasons, plaintiffs' motion to compel is granted.

X. Defendants' Application for Stay of Magistrate Judge's Order (Doc. 128)

Defendants requested the court to stay Judge Waxse's May 3, 2002 order denying defendants' request for protective order. Because the court has denied defendants' motion for review of magistrate's order, the court hereby denies the application for stay as moot.

XI. Defendants' Motion for Summary Judgment (Doc. 90) and Plaintiffs' Motion for Partial Summary Judgment (Doc. 107)

A. Standard

Summary judgment is appropriate if the moving party demonstrates that there is "no genuine issue as to any material fact" and that it is "entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). In applying this standard, the court views the evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving party. *Alder v. Wal-Mart Stores, Inc.*, 144 F.3d 664,670 (10th Cir. 1998)(citing *Matsushita Elec.*

Indus. Co. v. Zenith Radio Corp, 475 U.S. 574, 587 (1986)). A fact is "material" if it is "essential to the proper disposition of the claim." *Id.* (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). An issue of fact is "genuine" if "there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way." *Id.* (citing *Anderson*, 477 U.S. at 248).

The moving party bears the initial burden of demonstrating an absence of a genuine issue of material fact and entitlement to judgment as a matter of law. *Id.* at 670-71. In attempting to meet that standard, a movant that does not bear the ultimate burden of persuasion at trial need not negate the other party's claim; rather, the movant need simply pont out to the court a lack of evidence for the other party on an essential element of that party's claim. *Id.* at 671 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)).

Once the movant has met this initial burden, the burden shifts to the nonmoving party to "set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 256; *see Alder*, 144 F.3d at 671 n.1 (concerning shifting burdens on summary judgment). The non-moving party may not simply rest upon its pleadings to satisfy its burden. *Anderson*, 477 U.S. at 256. Rather, the nonmoving party must "set forth specific facts that would be admissible in evidence in the event of trial from which a rational trier of fact could find for the nonmovant". *Alder*, 144 F.3d at 671. "To accomplish this, the facts must be identified by reference to affidavits, deposition transcripts, or specific exhibits incorporated therein." *Id.*

Finally, the court notes that summary judgment is not a "disfavored procedural shortcut," rather, it is an important procedure "designed to secure the just, speedy and inexpensive determination of every action." *Celotex*, 477 U.S. at 327 (quoting Fed.R.Civ. P.1).

A. Facts

Plaintiffs R.L. and J.L. are the minor children of plaintiff D.L. R.L. is autistic and J.L. has a milder learning disability. (Defs. Mot. Summ J. Attach. 4 at 34:3-21). Both R.L. and J.L. are unemancipated minors. D.L. became divorced from R.L. and J.L.'s father in 1993. D.L. was awarded primary residential custody of R.L. and J.L. She is employed as a contract carrier for the *Kansas City Star*, and delivers newspapers from approximately midnight to 6:00 a.m. D.L. arranges for her parents and brothers to care for her children at night while she is at work.

Defendant U.S.D. # 497 is a public school district located in Lawrence, Kansas that receives both federal and state financial aid to provide special education services for students attending school in the district. Its governing body is the locally elected school board. Defendant Eicher has been Director of Special Education for defendant U.S.D. # 497 since July 1995. His responsibilities include developing defendant U.S.D. # 497's special education budget and recruiting and hiring special education teachers and paraprofessionals.

1. R.L. and J.L. Enroll as Residents of U.S.D. # 497

In August 1997, D.L. enrolled R.L. and J.L. in defendant U.S.D. # 497, and the children began attending schools in the district. That same month, D.L. began renting an apartment at 530 Eldridge in Lawrence, Kansas, located inside the boundaries of the defendant U.S.D. # 497. At the same time, D.L. also owned a house located at 1124 South 48th Terrace, Kansas City, Kansas, within the boundaries of Turner U.S.D. # 202. Prior to August 1997, D.L. resided at the 1124 South 48th Terrace address. D.L. did not fill out an application for nonresident admission of her sons to defendant U.S.D. # 497 for the school year beginning in August 1997. On or about September 1, 1997, D.L. purchased a house located at 1823 North 134th Street, Kansas City, Kansas, within the boundaries of the Piper School District. D.L. stated she purchased the property because her job required nighttime child care.

Prior to the 1997-1998 school year, R.L. and J.L. were enrolled in Turner U.S.D. No. 202 located in Kansas City, Kansas. R.L. was classified as a special education student and received an education in accordance with the Individual Education Program (IEP) which was developed for him by the Turner School District. The 1996-1997 year was the final school year in which R.L. and J.L. were enrolled in and attended school in the Turner School District.

Before she enrolled her children in defendant U.S.D. # 497, D.L. had brought her children for various treatments at the University of Kansas and within the city of Lawrence, Kansas. R.L. and J.L. each received special education services while they attended schools in defendant U.S.D. # 497. Defendant U.S.D. # 497 states that R.L.'s disability required him to have constant one-on-one support while he was enrolled in the district, such that his enrollment would require defendant U.S.D. # 497 to hire a paraprofessional to provide that support. Defendant U.S.D. # 497 evaluated J.L. in February 1999, when he was attending Sunflower Elementary School, and determined that J.L. should be placed in special education under the area of "exceptionality or other health impaired." Both R.L. and J.L. received special education services while they resided in defendant U.S.D. # 497. During the years R.L. was enrolled in defendant

U.S.D. # 497, he was classified as a special education student and received an appropriate public education in accordance with his IEP. J.L. also received an appropriate public education during the time he was enrolled in defendant U.S.D. # 497.

D.L. believed she was a resident of Lawrence because she rented the apartment there. D.L. stated that she rented the apartment in Lawrence because she wanted her children to get the best education possible, because she had brought her children to attend treatments in defendant U.S.D. # 497, and "had spent a great deal of time in Lawrence prior to moving there." (Pls.' Mot. Partial Summ. J. Attach. 4 at 24:8-12). Further, she believed her children could attend school in defendant U.S.D. # 497 in August 1997 because she was a Lawrence resident and taxpayer.

By September 2, 1997, D.L. rented a different apartment located at 2300 Wakarusa, Lawrence, Kansas. D.L. did not obtain a Kansas drivers' license indicating the Wakarusa address until January 6, 2000. Prior to that time, D.L.'s driver's license stated her address was 1124 S. 48th Terr., Kansas City, KS. D.L. stated she changed her driver's license address to 2300 Wakarusa in January of 2000 because her old one was incorrect and she had neglected to change it. However, D.L. never changed her driver's license to reflect the property at 1823 North 134th Street in Wyandotte County. Further, she did not register to vote in Douglas County until January 2000. D.L. had telephone, gas and utilities connected to the 2300 Wakarusa apartment. D.L. immediately notified defendant U.S.D. # 497 of her change of address. D.L. never filed income tax returns showing a Lawrence address, and instead continued to file them with a Kansas City, Kansas address. D.L. has continued to register her vehicles in Wyandotte County, Kansas, rather than Douglas County.

1. *The District Suspects Plaintiffs Are Nonresidents*

In February 1998, Kevin Brothers, a district special education coordinator at the elementary school J.L. attended, informed defendant Eicher that he did not think J.L. resided within the district. Also during the 1997-1998 school year, Suzie Soyster, principal of J.L.'s elementary school, received two to three anonymous phone calls from a woman who told her she believed that J.L. did not reside in Lawrence, but rather Wyandotte County.[12] Defendant Eicher sent a letter to D.L. on February 13, 1998, in which he notified her that the district had received information which gave the district reason to question the children's residence, and asked to confirm her legal address. The letter did not ask D.L. to do anything regarding her residency. Defendant Eicher sent the letter to both the Lawrence and Kansas City, Kansas addresses. Defendant Eicher testified that he sent the letter because of the anonymous phone call received by Ms. Soyster and because of the statements by Mr. Brothers. After defendant Eicher sent the letter, Mr. Brothers told defendant Eicher that D.L. had told him in a telephone conversation that she lived in the district. Defendant Eicher never met with or spoke to D.L.

Defendant Eicher testified that in December 1999, Cleo Langley, the Deputy Clerk of the Board of

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[12] Plaintiffs object to the statements of defendant Eicher and Suzie Soyster regarding what they were told by Kevin Brothers and the anonymous caller, respectively, as hearsay. Federal Rule of Evidence 801(c) provides that hearsay includes only statements which are offered to prove the truth of the matter asserted. The court finds that the statements are not hearsay, because defendants do not offer them to prove that what Kevin Brothers or the caller said was true. Rather, they are offered to explain why the district began its investigation of the plaintiff children's residence.

Education and Administrative Assistant to the Superintendent of Schools, told him she had received a telephone call from an anonymous caller who informed her that R.L. and J.L. were residents of Kansas City, Kansas and were driven each day from their home in Kansas City, Kansas to their respective schools in the District.[13] According to an e-mail produced by defendant U.S.D. # 497 on May 25, 2001, Ms. Langley did not identify the caller as a neighbor from Kansas City, Kansas. Ms. Langley has no independent recollection of this event.

Based upon this information, defendant Eicher consulted with the then-superintendent of defendant U.S.D. # 497, Kathleen Williams, and retained a private investigative firm to conduct videotape surveillance of R.L. and J.L. at a cost of $5,000 or $6,000. The purpose of the surveillance was to obtain information from which the district could determine whether the children were residents. Defendant Eicher instructed the investigators only to find information regarding where R.L. lived and where he woke up in the morning. Matthew Gabriel, the investigator hired by the district, conducted surveillance of the plaintiffs on November 29-30, 1999. Mr. Gabriel conducted the videotape surveillance while he was parked in a vehicle on a public residential street. He remained on public property throughout the surveillance, and all videotaped footage was obtained while the plaintiffs were outside their residence or within a vehicle.

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[13] Plaintiffs object to the statement of defendant Eicher regarding what he was told by Cleo Langley as hearsay. The court finds that the statement is not hearsay, because defendant does not offer it to prove what Ms. Langley told him was true; rather, it is offered to explain why defendant Eicher took further action to investigate plaintiffs' residency. Plaintiffs also object to Ms. Langley's statement on the grounds that she had no independent recollection of her conversations with the anonymous callers. The court finds that this objection does not affect the admissibility of Ms. Langley's statement for the purpose of showing the then-existing state of mind of defendant Eicher. Fed.R.Evid. 803(3). Regardless of whether it is true that Ms. Langley received the telephone calls, Defendant Eicher initiated surveillance of R.L. and J.L. based upon the information he received from Ms. Langley indicating that a caller stated the children were not residents of the district.

Defendant Eicher viewed the surveillance tapes, which showed D.L., on some occasions, and P.P. on others, transporting R.L. and J.L. from their respective schools in defendant U.S.D. # 497 to a house in Kansas City, Kansas. The tapes also show the children being transported in the morning from the same house in Kansas City, Kansas to their respective schools in defendant U.S.D. # 497. The tapes do not follow D.L. or P.P. after leaving the school in the morning to determine how or where they spent the day. According to defendant Eicher, it was not important where D.L. and P.P. spent the day. Defendant Eicher stated the district's residency policy defines residence by where the child "lays his head at night." The residency policy is not part of defendant U.S.D. # 497's written policies. Plaintiffs claim that, after dropping off the children, D.L. and P.P. would return to their apartment located at 2300 Wakarusa in Lawrence to sleep and take care of personal and work-related business.

2. The District Acts and Plaintiffs Respond

In or about November 1999, defendant Eicher consulted Rod Beiker, an attorney with the Kansas State Department of Education. Mr. Beiker advised defendant Eicher that a student's residence is determined by where the student sleeps at night. Defendant Eicher concluded, based upon the information provided to him from Mr. Beiker and the information obtained as a result of the private investigation, that neither R.L. nor J.L. was a resident of the district.

On December 3, 1999, counsel for defendant U.S.D. # 497 sent a letter to D.L. and P.P. to notify them that the district had determined that R.L. and J.L. were attending schools in the district even though D.L. and P.P. were not residents of the district. The letter stated that the children's attendance therefore violated Kansas law. The district demanded that D.L. and P.P. immediately withdraw the children from the district and enroll them either in the school district in which they resided, or in a private school of their choosing. The letter advised D.L. and P.P. that the district would take legal action if the demand was not met.

On January 4, 2000, defendant Eicher sent a letter to D.L. and P.P. informing them that January 13 of that year, the end of the first semester, would be the last day in which the children could attend defendant U.S.D. # 497, and threatening legal action if they did not comply.

On January 12, 2000, an attorney for D.L. and P.P. requested a due process hearing under federal and state special education laws on behalf of the children. The school district denied plaintiffs' request for a due process hearing.[14]

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[14] Plaintiffs object to defendants' proffer of a letter dated January 14, 2000 in which Mr. Hatley informed plaintiffs that the district was denying their request for the hearing because the children were nonresidents, and inviting plaintiffs' attorney at the time to present contrary authority. Plaintiffs argue that the letter is hearsay, and that it was offered in the scope of settlement negotiations. Fed.R.Evid. 408, 801 & 802. The court finds that the letter is not hearsay because it was the statement of the defendants' agent, Mr. Hatley, made concerning a matter within the scope of the agency, and made during the existence of the agency relationship. Fed.R.Evid. 801(d)(2)(D). Even though the court has granted defendants' motion to strike Mr. Hatley from plaintiffs' final witness list, this does not preclude the court from considering on summary judgment Mr. Hatley's statement contained in the letter. Fed.R.Evid.

Defendant Eicher sent a notice to D.L. and P.P. on January 13, 2000, indicating that the children would "receive no educational services from [defendant U.S.D. # 497] as long as they are not eligible for such services." (*Id.* Attach. 16). Further, the letter stated that D.L. and P.P. "are not authorized to enter upon any premises" of defendant U.S.D. # 497, and that if they did so, they "may expect to be subject to prosecution for criminal trespass." (*Id.*) In his deposition testimony, defendant Eicher stated he did not recall sending the notice.

On January 18, 2000, counsel for plaintiffs at the time, Ms. Urbom, stated that plaintiffs would "immediately conform their activities to the stated definition of 'residence,' since they have already been in substantial compliance as regards where the stepfather sleeps (during the day because of their work)."[15] (Defs.' Mot. Summ. J. Attach. 17). Further, Ms. Urbom stated that Kan Stat. Ann. 77-201(23) chooses sleeping as the

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56(e). Further, the court finds that there is no basis to conclude that the letter was part of any settlement negotiations between the parties. The plaintiffs' objection regarding Rule 408 is therefore overruled.

[15] Over plaintiffs' objection, the court finds that the January 18, 2000 and January 20, 2000 letters are admissible under the admission of a party-opponent exception to the hearsay rule. Fed.R.Evid. 801(d)(2)(D). Ms. Urbom was, as plaintiffs' attorney at the time, the agent of the plaintiffs and spoke concerning a matter within the scope of the agency relationship, and the statement was made during the existence of the relationship. The court overrules plaintiffs' objection that the letters are inadmissible under Rule 408 because it was made in the context of settlement negotiations, because there is no discussion of settlement in the letter.

determining characteristic of residence." [16](*Id.* Attach. 16).

On January 20, 2000, Ms. Urbom wrote to Mr. Hatley, and stated the plaintiffs "were conforming their schedule to permit both [D.L.] and the boys to sleep at their Lawrence address, in order to meet the statutory requirements for residence." (*Id.* Attach. 19).

D.L. executed an Affidavit of residency on January 24, 2000, in which she certified that R.L. was residing with her at 2300 Wakarusa Drive on a full-time basis. Further, she stated that she was providing the major portion of the financial support of R.L. The school district allowed D.L.'s children to return to school after this affidavit was executed. D.L. does not contend that defendant U.S.D. # 497 denied her children educational services after she executed the affidavit of residency in January 2000.

On January 13, 2000 and January 14, 2000, R.L. and J.L. were absent from school because D.L. and P.P. were sick, and were therefore unable to transport the children from Kansas City to Lawrence for school. R.L. did not sleep at the apartment located within defendant U.S.D. # 497 at any time before the affidavit was executed. In or about January 2000, R.L. and J.L. each spent approximately one week sleeping at an apartment rented by D.L. in Lawrence, which was in defendant U.S.D. # 497's boundaries. R.L. stopped sleeping at the Lawrence apartment about a week after the affidavit was executed and resumed sleeping at his home in Kansas City, Kansas. After D.L. executed the affidavit, she stayed with her children at 2300 Wakarusa for about a week. Because of R.L.'s worsening condition, D.L. allowed R.L. to stay in Kansas City, Kansas with D.L.'s parents or brothers at night. D.L. did not inform any district employee when R.L. and J.L. stopped sleeping at the Lawrence apartment, because, she claims, she was not asked the question and was not told to report where either she or the children slept.

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[16] The court overrules plaintiffs' objection that this testimony is hearsay, under the admission of a party-opponent exception to the hearsay rule. Fed.R.Evid. 801(d)(2)(D).

On March 15-16, 2000, and March 27-29, 2000, the district again conducted videotaped surveillance of the plaintiffs. Based upon this investigation, the district concluded that R.L. and J.L. were not residing within the district.

4. The State Court Action

Defendant U.S.D. # 497 filed a lawsuit against D.L. and P.P. in Douglas County District Court on April 18, 2000, more than two years after the February 13, 1998 letter sent by defendant Eicher to D.L. The petition alleged fraud and requested injunctive relief. The minor plaintiffs were not specifically identified, but were referred to by their initials throughout the petition. Plaintiffs filed documents in the Douglas County case that contained the full names of R.L. and J.L. Plaintiffs did not move to have the court seal the file in that case. D.L. cannot recall any disclosures by any district representative to the news media of personally identifiable information, beyond the content of the Douglas County petition itself. Plaintiffs state they were placed in a false light when a newspaper reported on the district's lawsuit. Plaintiff D.L. is not aware of any press releases or other measures that the district took to publicize the filing of the lawsuit.

Defendant Eicher stated that Ms. Williams, the former superintendent of schools, made the final decision to file the lawsuit. Defendant Eicher did not seek approval for the lawsuit from the Board of Education until the Board, after reading about the lawsuit in the local newspaper, expressed some concern that it had not been approved. However, the Board of Education for U.S.D. # 497 subsequently ratified the lawsuit at its August 14, 2000 meeting. Shortly after the lawsuit was filed, on April 20, 2000, an article appeared in the *Lawrence Journal-World* discussing the suit.

5. R.L. and J.L. Stop Attending Defendant U.S.D. # 497

R.L. and J.L. stopped attending defendant U.S.D. # 497's schools from January 13-24, 2000. Plaintiffs contend that R.L. and J.L. stopped attending the district's schools because they were, in effect, expelled. Plaintiffs further contend that there is no legal provision for forcible removal of enrolled pupils except expulsion. D.L. does not claim defendant U.S.D. # 497 denied her children educational services after she executed the affidavit of residency in January 2000. Rather, D.L. claims that her children were denied educational services from January 13 to 24, 2000.

At some point after defendants filed their state court action in April 2000, D.L. withdrew her children from defendant U.S.D. # 497 and enrolled R.L. and J.L. in the Piper School District. The date upon which D.L. withdrew her children from defendant U.S.D. # 497 is unclear form the record. On the Piper School District enrollment form, which is unsigned and undated, D.L. represented that her address was 1823 North 134th Street, Kansas City, Kansas. R.L. and J.L. are receiving an appropriate education in the schools that they currently attend. D.L. lives between two and ten miles from the Piper school district middle school that J.L. presently attends.

6. Nonresident Admissions Procedure

D.L. did not fill out an application for nonresident admission of her sons to defendant U.S.D. # 497 for the school year beginning in August 1997, and has never applied for admission to defendant U.S.D. # 497 as a nonresident. Defendant U.S.D. # 497's Board of Education Policy # 602.8 permits a nonresident student to apply for admission through the district office. The policy states that "[a] parent or guardian must request admission by completing a district application for nonresident admission." (Defs.' Mot. Summ. J. Attach. 6). Further, the policy provides that "[a]ll applications shall be considered on an equal basis and no student's request shall be refused on the basis of race, gender, religion, or ethnicity." (*Id.*).

The affidavit of residency executed by D.L. in this case was forwarded to defendant Eicher. After he received the Affidavit of residency, defendant Eicher decided to conduct further surveillance and investigation, because, based upon the information he received concerning anonymous calls, he did not believe D.L. was telling the truth. However, defendant Eicher did not conduct this surveillance until March 2000, approximately two months after D.L. executed the affidavit. In the seven years he had been with defendant U.S.D. # 497, defendant Eicher had never conducted further investigation of an affidavit of residency he believed to be false. At the same time, however, defendant Eicher testified that another incident occurred in which he believed that a foster parent had lied about a child's address. Defendant Eicher then contacted the foster parent and the Kansas Department of Social and Rehabilitative Services, and informed them that the child was no longer allowed to stay in the school district. The only occasion on which defendant U.S.D. # 497 had ever engaged a private detective agency to investigate the residence of a student was when the district was investigating plaintiffs.

Defendant Eicher testified that, besides the plaintiffs' situation and that of the foster child, there was only one other instance in which he did not believe that a special education student enrolled in the district did not actually reside in the district, and defendant Eicher then took steps beyond requesting an affidavit of residency. That student also was autistic.

Having established the relevant factual background, the court turns to its analysis of defendants' motion for summary judgment and plaintiffs' motion for partial summary judgment. Prior to considering the merits of those motions, however, the court must consider whether plaintiffs have standing to pursue their claims in this action.

B. Standing

1. Challenges to Nonresident Admissions Policy

Although defendants did not raise the issue of whether plaintiffs have standing to challenge defendant U.S.D. # 497's nonresident admissions policy, the court must consider *sua sponte* whether a party has standing. *Essence, Inc. v. City of Fed. Heights*, 285 F.3d 1272, 1980 (10th Cir. 2002). Article III limits federal judicial power to the adjudication of cases or controversies. *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975). To have Article III standing, a plaintiff must establish three elements:

> (1)"[I]njury in fact"--meaning "the invasion of a legally protected interest that is (a) concrete and particularized, and (b)

> actual or imminent, not conjectural or hypothetical"; (2) "a causal relationship between the injury and the challenged conduct"--meaning that the "injury fairly can be traced to the challenged action of the defendant"; and (3) "a likelihood that the injury will be redressed by a favorable decision'--meaning that the prospect of obtaining relief from ... a favorable ruling is not too speculative."

Buchwald v. Univ. of N.M. Sch. Of Med., 159 F.3d 487, 492-93 (10th Cir. 1998)(quoting *Northwestern Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 663-64(1993)). As the party invoking federal jurisdiction, plaintiffs bear the burden of establishing the elements of standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992).

Plaintiffs challenge defendant U.S.D. # 497's nonresident admissions policy, asserting that it violates the Equal Protection and Due Process Clauses, the ADA, and § 504 of the Rehabilitation Act. Plaintiffs seek (1) a declaratory judgment that their rights protected by these laws were violated; (2) compensatory and punitive damages; (3) injunctive relief in the form of an order to school officials "to permit the minor children to attend school in a non-hostile environment free from defendants' unlawful harassment"; (4) an order that school officials must include discrimination against disabled students as conduct prohibited by its admissions policy; (5) "extra residential requirements not contained in state statutes or school board policies;" (6) costs, and (7) attorneys' fees. (Compl. at 9-12).

A plaintiff has standing to recover compensatory damages for injuries caused by an educational institution that rejected her under an allegedly unconstitutional admissions policy. *Buchwald*, 159 F.3d at 493. Such a plaintiff also has standing to seek a prospective injunction ordering the educational institution to admit her. *Id.* However, plaintiffs do not contend they have applied to the district for admission under the nonresident admissions policy. Therefore, they cannot claim that they were injured because defendant U.S.D. # 497 refused them admission pursuant to the policy. Further, to the extent that plaintiffs allege the nonresident admissions policy is facially unconstitutional, although "the rules for standing are less stringent for a facial challenge to a statute, a plaintiff must still satisfy the injury-in-fact requirement." *PeTA, People for the Ethical Treatment of Animals v. Rasmussen*, 298 F.3d 1198, 1203 (10th Circ. 2002) (citation omitted). As such, the court finds that plaintiffs have failed to show they endured an actual, imminent, concrete, and particularized injury resulting from defendant U.S.D. # 497's nonresident admissions policy.

Further, plaintiffs cannot obtain prospective injunctive relief pursuant to their claims that the nonresident admissions policy violates federal law. In the admissions context, forward-looking injunctive or declaratory relief is not available to a plaintiff who cannot "demonstrate the 'imminence' of her injury by making 'an adequate showing' that she will reapply to [the educational institution] and will thus be evaluated under the disputed policy again 'in the relatively near future.' "*Buchwald*, 159 F.3d at 494 (quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211 (1995)). "A plaintiff is required only to allege concrete plans; he is not required to successfully execute those plans."*Roe No. 2 v. Ogden*, 253 F.3d 1225, 1229 (10th Cir. 2001)(citing *Lujan*, 504 U.S. at 561; *Buchwald*, 159 F.3d at 493). Here, however, plaintiffs have not asserted that they would seek admission under defendant U.S.D. # 497's nonresident admissions policy. In fact, plaintiffs continue to maintain that they are residents of the district.

Accordingly, the court finds that plaintiffs do not have standing to pursue prospective injunctive relief regarding the district's nonresident admissions policy. Moreover, because the court construes plaintiffs' Rehabilitation Act and ADA claims as based entirely upon the nonresident admissions policy,[17] those claims are hereby dismissed without prejudice. Plaintiffs' Due Process and Equal Protection claims are dismissed without prejudice to the extent that they are based upon the nonresident admissions policy.

Plaintiffs do, however, have standing to the extent their claims stem from defendants' denial of a due process hearing which plaintiffs requested. Under the standard enumerated above, plaintiffs have articulated that they suffered an actual, concrete, particularized injury when defendant U.S.D. # 497 denied their request for a hearing on the grounds that plaintiffs were nonresidents.

2. Standing of P.P.

Defendants assert that P.P. lacks standing because he has no legal relationship with D.L., R.L., or J.L. P.P. is not a parent or guardian of R.L. and J.L., and is not married to D.L. The court determines P.P.'s standing only in the context of plaintiffs' remaining IDEA and procedural due process claims. Plaintiffs cite no authority for the proposition that IDEA guarantees rights to individuals who are not parents or guardians of children. Further, the statute extends procedural safeguards only to "parents." 20 U.S.C. § 1415. Consequently, the court finds P.P. does not have standing to sue under IDEA.

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[17] Plaintiffs argue that defendants violated the ADA by taking into account R.L. and J.L.'s disabilities prior to denying them admission. The court construes plaintiffs' argument as attacking the nonresident admissions policy, because defendant U.S.D. # 497 permitted the plaintiffs to enroll when they first applied to the district, and plaintiffs never attempted to enroll as nonresidents.

Further, plaintiffs have not shown that P.P. was injured by defendant U.S.D. # 497's denial of a due process hearing. Although plaintiffs allege P.P. may have had standing due to his association with J.L., R.L., and D.L., there is no showing that, in this case, P.P. was injured due to that relationship. There is no showing that P.P. even requested a hearing or would have attended a hearing had defendants granted one. The January 12, 2000 letter requesting a hearing referred only to D.L. Accordingly, the court thus finds that P.P. has failed to allege sufficient injury for standing purposes. Defendants' Motion for Summary Judgment is granted in its entirety as to P.P.

C. IDEA

Plaintiffs allege defendants violated the procedural guarantees of IDEA in several respects. Specifically, plaintiffs claim that defendants violated IDEA by denying plaintiffs' request for a due process hearing and failing to provide plaintiffs with notice of their appeal rights. Plaintiffs also contend that defendants suspended plaintiffs R.L. and J.L. for a period of time in January 2000, and that this constituted a "change in placement" for which IDEA requires advance parental approval. Plaintiffs contend that this suspension constituted a denial of a free appropriate public education (FAPE) to which R.L. and J.L. were entitled under IDEA.

Thus, plaintiffs seek a declaratory judgment that defendants violated their rights under IDEA, an award of compensatory education for the wrongful expulsion of the children, "equitable relief including enjoining the defendants' refusal to abide by the statutory requirements of IDEA, specifically including the Procedural Safeguards which protect families from the abuses perpetrated by defendants; and such other relief as the court deems just and equitable." Before examining plaintiffs' IDEA claims on the merits, the court must first determine whether they are properly before the court.

1. Mootness

Defendants assert that plaintiffs are not entitled to prospective relief ordering defendants to hold a due process hearing, because plaintiffs R.L. and J.L. are no longer enrolled in the district. A federal court must dismiss an action when a case or controversy ceases to exist. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937). A case becomes moot when the issues presented are no longer live and the parties lack a legally cognizable interest in the outcome. *Powell v. McCormack*, 395 U.S. 486, 496 (1969). Several courts have determined that, when a student requests a hearing *after* changing school districts, her right to challenge prior educational services in the previous district is mooted. *E.g., Thompson v. Bd. Of Special Sch. Dist. No. 1*, 144 F.3d 574, 579 (8th Cir. 1998). In this case, however, plaintiffs requested a due process hearing while J.L. and R.L. were enrolled in defendant U.S.D. # 497.

Moreover, several courts have recognized that IDEA claims may fall within the "capable of repetition yet evading review" exception to the mootness doctrine. A case falling into this exception must contain two elements: (1) the duration of the case must be too short to allow a determination on the merits; and (2) the particular plaintiff must have a reasonable expectation of suffering from the same harm again. *Murphy v. Hunt*, 455 U.S. 478, 482 (1982). This exception applies when, as here, a parent removes his or her child from a school district and *simultaneously* seeks judicial relief from decisions of the school district. *E.g., Lee v. Biloxi Sch. Dist.*, 963 F.2d 837, 839 (5th Cir. 1992) ("[A parent's] refusal to sacrifice critical years of her daughter's development pending time-consuming review proceedings does not render her case moot. To hold otherwise effectively would insulate EHA claims from judicial review."). In addition, there is a reasonable probability that plaintiffs would seek resident admission to defendant U.S.D. # 497, that the district would deny them admission, and that plaintiffs would again request a due process hearing. The record reflects that D.L. and P.P. continue to own the Lawrence apartment and that D.L. believed her children would receive the best education in defendant U.S.D. # 497. Accordingly, the court finds plaintiffs' IDEA claims are not moot, but rather within the "capable of repetition, yet evading review" exception to the mootness doctrine.

2. Exhaustion of Administrative Remedies

Defendants contend plaintiffs' IDEA claims cannot survive summary judgment, because plaintiffs failed to exhaust the available administrative remedies when they did not appeal to the Kansas State Board of Education (State BOE) defendant U.S.D. # 497's denial of their request for a hearing prior to seeking review in this court. Plaintiffs counter that their failure to appeal to the State BOE was caused by defendants' failure to comply with IDEA's requirement that parents must be given notice of their appeal rights. Further, they contend that they were not required to exhaust administrative remedies, because exhaustion would have been futile. To address the parties' arguments, the court must first consider the nature and purpose of the procedural safeguards and exhaustion requirements of the IDEA.

Congress enacted the predecessor of IDEA, the Education of the Handicapped Act (EHA) in 1975. IDEA's primary purpose is "to assure that all children with disabilities have available to them ... a free appropriate public education which emphasizes special education and related services designed to meet their unique needs ... [and] to ensure that the rights of children with disabilities and the parents of such children are protected." 20 U.S.C. §1400(d)(1)(A)-(B). To this end, any state that elects to receive federal funding under IDEA must provide a "free appropriate public education" to all children with disabilities residing in the state between the ages of three and twenty-one, "including children with disabilities who have been suspended or expelled from school." *Id.* § 1412(a)(1)(A). States may receive assistance under IDEA if they adopt certain procedural safeguards, *id.* §1412(a)(6), and a public school board of education, or "local educational agency," may receive financial assistance if it has adopted procedures compliant with those established by the state pursuant to IDEA. *Id.* §§ 1401(15), (28), 1413(a)(1).

Among the procedures IDEA guarantees is the right of parents to an impartial due process hearing regarding "any complaint" about "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." *Id.* §1415(f). Under the state regulations implementing this provision, "the agency directly responsible for the education of the child" is required to provide the due process hearing. Kan. Admin. Reg. 91-40-28(c). In this case, defendants denied plaintiffs' request for a due process hearing on the grounds that plaintiffs were not residents of the district.

Defendants argue that plaintiffs failed to exhaust their administrative remedies under the IDEA because they did not seek review of defendants' denial of a due process hearing before the State BOE. IDEA provides that a party "aggrieved by the findings and decision rendered in [a hearing required by 20 U.S.C. §1415(f)] may appeal such findings and decision to the State educational agency. Such agency shall conduct an impartial review of such decision. The officer conducting such review shall make an independent decision upon completion of such review." *Id.* § 1415(g). The Kansas statute which implements IDEA provides that the due process hearing must be conducted at the local level by a hearing officer, with the right to appeal to the State BOE. Kan.Stat.Ann. §§72-973, 72-974.

Plaintiffs claim that failure to exhaust administrative remedies is an affirmative defense which can be waived. The court disagrees. A party's failure to plead compliance with IDEA's statutory exhaustion requirements precludes the court from exercising subject matter jurisdiction. *See Cudjoe,* 297 F.3d at 1064 ("We believe that both the language and the policy of the IDEA suggest that if a student with a disability seeks to bring a claim for educational injuries, then he must plead and show either that he has exhausted his administrative remedies under the IDEA or that the relief he is seeking is not available under the IDEA.").

However, exhaustion of the available administrative remedies is not required when it would be futile, would fail to provide adequate relief, or when an agency has adopted a policy of general applicability that is contrary to the law. *Honig v. Doe*, 484 U.S. 305, 327 (1988); *Ass'n for Comty. Living v. Romer*, 992 F.2d 1040, 1044 (10th Cir. 1993). Plaintiffs, as the party seeking to avoid exhaustion, bear the burden to show that one of these exceptions applies. *Id.* at 1044.

Plaintiffs argue, *inter alia,* that exhaustion would be futile because defendants refused to provide the due process hearing plaintiffs requested. The court agrees. The court is persuaded that requiring plaintiffs to exhaust defendant U.S.D. # 497 officials' denial of a due process hearing would be futile. Defendants cite no law indicating that the *denial* of a due process hearing by a local school board must be appealed to the State BOE, and the court found no authority for this proposition. The plain language of IDEA appears to assume that a local educational agency must hold a hearing before an appeal is required. *See* 20 U.S.C. §1415(g) ("If the hearing required by subsection (f) of this section is conducted by a local educational agency, any part aggrieved by the findings and decision *rendered in such a hearing* may appeal such findings and decision to the State educational agency.") (emphasis added). In this case, because no due process hearing was held, there are no findings and no decision of the local educational agency that would be appealable. Further, defendant U.S.D. # 497 issued no findings and created no record in its denial of a hearing. The court believes it is incongruous for defendants to argue that plaintiffs must have exhausted their administrative remedies under IDEA in one breath, when at the same time defendants argue that plaintiffs have no right to a hearing. *Padilla v. Sch. Dist. No. 1*, 35 F.Supp.2d 1260, 1265 (D. Colo. 1999), *rev'd on other grounds*, 233 F.3d 1268 (10th Cir. 2000). Accordingly, the court finds plaintiffs were not required to exhaust their administrative remedies prior to bringing suit under IDEA.

3. Authority of IDEA Hearing Officers

Defendants argue that plaintiffs had no right to a due process hearing under IDEA, because questions of residency are outside the scope of IDEA hearing officers' jurisdiction. Defendants cite no persuasive legal authority. Rather, each case cited by defendants involved a situation in which a hearing officer was without authority to rule on plaintiff's claims because the claims were moot, not because the hearing officer lacked authority to decide the type of issue for which plaintiff sought review. *E.g. Smith v. Special Sch. Dist. No. 1*, 184 F.3d 764 (8th Cir. 1999) (affirming decision of district court that hearing officer lacked jurisdiction when plaintiff no longer resided in the district in which he sought a hearing); *Thompson*, 144 F.3d 574 (same).

Further, the court's review of the Kansas administrative regulations pertaining to school district hearing officers does not indicate that questions of residency are outside the scope of a hearing officer's authority. To the contrary, due process hearing officers must be familiar with special education laws. A person can be qualified initially to become a due process hearing officer or review officer only if she (1) is a licensed attorney in good standing; (2) passes written exams prepared by the state State BOE concerning special education laws and due process proceedings; and (3) completes a program sponsored or approved by the State BOE concerning due process hearing procedures and the role and responsibilities of a due process hearing officer. Kan. Admin. Reg. 91-40-29.[18] Though it is unclear whether Kansas residency law is included in the training, these requirements give rise to an inference that decisions regarding residency are within the scope of a hearing officer's jurisdiction because the officers must have legal training. The court rejects defendants' assertion that plaintiffs were not entitled to a due process hearing under

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[18] This regulation also provides that a person who "was on the list of qualified due process hearing officers maintained by the state State BOE" prior to the date upon which the regulation became effective shall remain eligible to serve as a due process hearing officer if she completes the continuing education requirements required for new officers. Kan. Admin. Reg. 91-40-29.

IDEA because hearing officers lack jurisdiction to consider issues of residency.

4. Compensatory and Punitive Damages

Further, defendants argue plaintiffs have no claim for money damages under IDEA because, in defendants' view, the statute does not permit successful plaintiffs to collect compensatory and punitive damages. Because the Tenth Circuit has not held that compensatory damages are unavailable under IDEA, *Padilla*, 233 F.3d at 1274, the court declines to find that compensatory damages are unavailable under IDEA. Defendants argued that punitive damages were unavailable as a matter of law, because compensatory damages were unavailable under IDEA. Because the court finds that compensatory damages are available, the court rejects defendants' argument that punitive damages are unavailable.

5. Residency

The court finds plaintiffs have shown there is a genuine issue of material fact regarding whether (1) D.L. was a resident of defendant U.S.D. # 497 during January 13-24, 2000, and (2) whether R.L. and J.L. resided with D.L. inside the boundaries of defendant U.S.D. # 497 during January 13-24, 2000.

6. Loss of Substantive Benefits

Defendants argue that their failure to provide a due process hearing does not create a cause of action under IDEA, because plaintiffs suffered no loss in substantive benefits. The Tenth Circuit has held that "[f]or an IDEA claim based on deprivation of a due process hearing and/or other procedures to be cognizable [it] must be linked with a consequent loss of substantive benefits." *T.S. v. Indep. Sch. Dist. No. 54*, 265 F.3d 1090, 1093 (10th Cir. 2001), *cert. denied*, 535 U.S. 927 (2002). "Procedural defects alone do not constitute a violation of the right to a FAPE unless they result in the loss of an educational opportunity." *Id.* at 1095.

It is undisputed that after plaintiff D.L. executed her affidavit of residency on January 24, 2000, R.L. and J.L. received a FAPE. The court must therefore consider whether plaintiffs sustained a loss in substantive benefits when they were unable to attend school from January 13-24, 2000, after defendant Eicher informed plaintiffs they could not attend school "as long as they were nonresidents," and the district denied them a hearing. Defendants claim that their denial of a due process hearing was not the cause in fact of plaintiffs' failure to attend school on these days, because plaintiff D.L. stated that she and P.P. were too sick to drive the children to school on those days. The court believes plaintiffs have shown a genuine issue of material fact regarding whether defendants' denial of a due process hearing resulted in a loss of substantive benefits when R.L. and J.L. were absent from school January 13-24, 2000.

Accordingly, the court denies defendants' motion for summary judgment as to plaintiffs' IDEA claims. Plaintiffs' motion for partial summary judgment on their IDEA claim is also denied. The court turns to plaintiffs' arguments under the Due Process and Equal Protection Clauses.

D. 42 U.S.C. § 1983

At the outset, the court notes that it is "beyond dispute that a plaintiff need not exhaust state administrative remedies before filing suit in federal court under §1983. *Tonkovich v. Kan. Bd. of Regents*, 159 F.3d 504, 519 (10th Cir. 1998). The court already found that plaintiffs were not required to exhaust their administrative remedies. However, even if there were such a requirement in these circumstances, the court finds that plaintiffs' failure to appeal defendants' denial of a due process hearing to the State BOE would not divest the court of subject matter jurisdiction over plaintiffs' §1983 claims. The court therefore turns to merits of plaintiffs' claims.

1. Procedural Due Process

To state a claim for a violation of procedural due process, plaintiffs must show that defendants deprived them of a liberty or property interest without due process of law. Even though "there is no constitutional right to an education at public expense," a student's legitimate entitlement to a public education "as a property interest which is protected by the Due Process Clause ... may not be taken away ... without adherence to the minimum procedures required by that clause." *Goss v. Lopez*, 419 U.S. 565, 574 (1975). The Supreme Court in *Goss* determined that Ohio state law entitled eligible students to school attendance, thus creating a property interest. *Id.* at 573-74. The Court also held that school suspensions implicate liberty interests under the Due Process Clause. *Id.* at 574-75.

Similarly, Kansas state law entitles "any child who has attained the age of eligibility for school attendance [to] attend school in the district in which the child lives if(1) the child lives with a resident of the district and the resident is the parent, or a person acting as parent of the child." Kan.Stat.Ann. §72-1046(a). Defendants' justification for refusing to provide plaintiffs with a due process hearing was that plaintiffs were nonresidents, and that, as a result, state law did not guarantee them a property or liberty interest in continued education by defendant U.S.D. # 497.

In examining this argument, the court expressly declines to rule on the question whether plaintiffs were residents of defendant U.S.D. # 497, because it is not necessary to the finding of a constitutional violation in this case and because the court has found the existence of a genuine issue of material fact regarding plaintiffs' residency. The court rejects defendants' argument that, because plaintiffs were nonresidents, they could not seek review of defendants' finding that plaintiffs were nonresidents. If accepted by the court, defendants' argument would preclude any student from seeking review of a school district's determination that she was not a resident, eliminating students' rights to procedural due process in this circumstance. "The root requirement of the Due Process Clause is that an individual be given an opportunity for a hearing *before* he is deprived of any significant protected interest." *Cleveland Bd. of Educ. V. Loudermill*, 470 U.S. 532 (1985). Thus, even if defendants are correct in their assertion that plaintiffs were not residents of the district, plaintiffs had a property and liberty interest in continuing to attend the district until they had an opportunity to be heard on the residency issue.

Having found the presence of a property and liberty interest, the court must examine what due process is required. To make this determination, the court must balance three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the

> fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Matthews v. Eldridge, 424 U.S. 319, 335 (1976).

Applying this test in the context of disciplinary suspensions, the Supreme Court has held that:

> [T]here can be no doubt that at a minimum [the Due Process Clause] requires that deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for hearing appropriate to the case. The fundamental requisite of due process of law is the opportunity to be heard.... At the very minimum, therefore, students facing suspension and the consequent interference with a protected property interest must be given some kind of notice and afforded some kind of hearing.

Goss, 419 U.S. at 574-75 (citations omitted).

While the Supreme Court recognized that extensive predeprivation process is not required because discipline is essential to the orderly functioning of schools, it stated that at least some predeprivation procedural due process, including the right to present the student's version of events, is required. *Id.* at 581 (finding that, for suspensions often days or less, the Due Process Clause requires "that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story"). Although

Goss and many other procedural due process cases examine suspensions for disciplinary reasons, the court finds that such cases are persuasive in this context, in which defendants allegedly suspended plaintiffs R.L. and J.L. because defendants believed the children were nonresidents.

Applying the first factor of the *Mathews* balancing test, therefore, the court finds that the private interest that would be affected by defendants' action, plaintiffs' suspension from school, is significant even though plaintiffs were absent from school for a relatively short duration. As noted above, plaintiffs were suspended from school January 13, 2000 and returned to school January 24, 2000. D.L. stated that D.L. and P.P.'s illnesses precluded them from being able to transport the children to school on January 13 and 14. Accordingly, plaintiffs missed only five school days, one of which could have been a holiday. Nevertheless, the Supreme Court has determined that "as long as a property deprivation is not de minimis, its gravity is irrelevant to the question whether account must be taken of the Due Process Clause." *Goss*, 419 U.S. at 576 (finding a 10-day suspension from school is not de minimis). Although the Court recognized that suspension is a milder deprivation than expulsion, it also stated:

> "Education is perhaps the most important function of state and local governments," and the total exclusion from the educational process for more than a trivial period, and certainly if the suspension is for 10 days, is a serious event in the life of the suspended child. Neither the property interest in educational benefits temporarily denied nor the liberty interest in reputation, which is also implicated, is so insubstantial that suspensions may

> constitutionally be imposed by any procedure the school chooses, no matter how arbitrary.

Id. at 576 (citing *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)). The court believes the rationale in *Goss* is applicable here, where J.L. and R.L. were absent from school for five days, and defendant U.S.D. # 497's letter suspending the students contemplated a suspension for an indefinite period of time, i.e., for "as long as plaintiffs were not residents" of the district. Defendants' denial of a due process hearing thus implicated plaintiffs' property and liberty interests.

The court must next determine "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards." *Matthews*, 424 U.S. at 335. Because plaintiffs had no opportunity to present evidence that they were residents of the district, the district's decision was based upon incomplete information. Thus, the risk that the district erred in determining plaintiffs' residency is high. Affording plaintiffs a due process hearing clearly would have been valuable in finding the truth regarding plaintiffs' residency.

Finally, the court weighs the defendants' interest, including the "fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* Defendants do not argue that providing a due process hearing prior to suspending allegedly nonresident students would be burdensome. Further, there is no evidence in the record regarding the number of suspensions of nonresident students the district conducts in a given year. On the record before it, the court finds that defendants have failed to show that providing predeprivation due process hearings to allegedly nonresident students would be burdensome.

Balancing these factors, the court finds that plaintiffs' interest in predeprivation process and the risk of erroneous denial of plaintiffs' rights were significant, while the burden defendants would have endured in offering a due process hearing was not substantial. *Mathews* thus compels the court to find that defendants' failure to provide plaintiffs with a predeprivation due process hearing violated plaintiffs' rights under the Due Process Clause. The court therefore grants plaintiffs' Motion for Partial Summary Judgment to the extent plaintiffs allege that defendants violated plaintiffs' rights to procedural due process.[19]

Further, the court notes that the record reflects the undisputed fact that defendant U.S.D. # 497 denied plaintiffs' request for a due process hearing through its counsel. The record does not indicate that defendant Eicher was responsible for, or in any manner involved in the denial of a due process hearing. Accordingly, defendants' Motion for Summary Judgment is granted as to defendant Eicher regarding the procedural due process claim.

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[19] For clarity, the court notes that it grants in part plaintiffs' arguments in section IV.G of their Motion for Partial Summary Judgment. The court clarifies that plaintiffs denominate the entire paragraph as seeking "summary judgment on their claim for declaratory relief based on substantive due process," when plaintiffs are in fact seeking, in part, summary judgment for procedural due process stemming from defendants' denial of plaintiffs' property and liberty interest in their education. The court does not grant summary judgment to the extent the rest of the paragraph concerns substantive due process--i.e., the arguments that defendants infringed upon rights plaintiffs allege to be fundamental--the right to education, to travel, and "to have as many residences as they desire."

2. Substantive Due Process and Equal Protection

Plaintiffs claim that their substantive rights under the Due Process Clause were infringed when defendants "sued D.L. and P.P. [in the state court action] for attempting to establish a residence within the boundaries of the school district solely because of the fact that both of D.L.'s children have disabilities and, in particular, because one of her children has autism." (Mem. in Support of Pls.' Mot. Partial Summ. J. at 33). Plaintiffs contend defendants' lawsuit unconstitutionally burdened plaintiffs' fundamental rights to education, to travel, and to have "as many residences as they desire and to be able to select the residence of their choice without interference or harassment by defendants." According to plaintiffs, because defendants' lawsuit has implicated plaintiffs' fundamental rights, it is constitutional only if it survives strict scrutiny analysis.

The court finds plaintiffs have not shown that defendants' action implicated any fundamental right. The court first examines plaintiffs' claim that plaintiffs had a fundamental right to an education under Kansas law. The Supreme Court has "not yet definitively settled the questions whether a minimally adequate education is a fundamental right and whether a statute alleged to discriminatorily infringe that right should be accorded heightened equal protection review." *Papasan v. Allain*, 478 U.S. 265 (1986); *see also San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (rejecting claim that education is a fundamental right). To determine the existence of a fundamental right, the court must assess whether a claimed right is explicitly or implicitly guaranteed by the Constitution. *Rodriguez*, 411 U.S. at 33. Plaintiffs contend that, although the United States Supreme Court has not recognized that education is a fundamental right under the United States Constitution, Kansas law guarantees that education is a fundamental right. However, the Kansas Supreme Court has held that the Kansas Constitution does not guarantee that education is a fundamental right, and has thus applied the rational basis test to allegations of infringement of the right to education. *E.g., Unified Sch. Dist. No. 229 v. State*, 256 Kan. 232, 263 (1994). The court declines to find that education is a fundamental right guaranteed by the United States or Kansas Constitutions.

Second, plaintiffs assert that defendants have burdened their right to travel. The United States Supreme Court has clearly recognized that the right to interstate travel is fundamental. *See United States v. Guest,*383 U.S. 745 (1966). However, plaintiffs' right to interstate travel is not implicated on the record before the court. "The federal guarantee of interstate travel ... protects interstate travelers against two sets of burdens: 'the erection of actual barriers to interstate movement' and 'being treated differently' from intrastate travelers." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 271 (1993).

In the instant case, plaintiffs allege that their right to travel was infringed because defendants' actions prevented them from seeking to establish a residency in Lawrence, Kansas, while owning property in Kansas City, Kansas. Plaintiffs also contend defendants burdened the right of plaintiffs to travel between Lawrence and Kansas City, Kansas, and to own dwellings in both places.

Importantly, plaintiffs have alleged facts which could demonstrate only that defendants impaired plaintiffs' right to *intrastate* travel. Even if the court were to find that defendants burdened plaintiffs' ability to travel, "a purely intrastate restriction does not implicate the right of interstate travel." *Id.* at 277. Plaintiffs do not allege they were prevented from traveling outside the state of Kansas, or that they were treated differently from interstate travelers. Furthermore, upon its own review, the court has not located any state statutory or case law providing for a right to intrastate travel. Plaintiffs thus cannot state a claim that their constitutional right to interstate travel was impaired.[20]

Consequently, defendants' actions do not trigger strict scrutiny, but must merely survive rational basis analysis. Given the strength of the defendants' right of access to the courts and apparent good faith in bringing suit, the court finds that the district's action is rationally related to a legitimate governmental purpose and is therefore constitutional.

Plaintiffs also allege a vague Equal Protection argument that defendants discriminated against them on the basis of R.L. and J.L's disability by bringing the state court action. Even if plaintiffs could show that defendants brought suit *because of* plaintiffs' disabilities, governmental action that discriminates on the basis of disability is subject only to rational basis review. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985).

"[I]f a law neither burdens a fundamental right nor targets a suspect class, [the court] will uphold the legislative classification so long as it bears a rational relation to some legitimate end." *Romer v. Evans*, 517

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[20] The court rejects plaintiffs' claim that their fundamental right to have "as many residences as they desire and to be able to select the residence of their choice without interference or harassment by defendants," was infringed. Plaintiffs cite no authority for the proposition that the right to own multiple residences is fundamental.

U.S. 620, 631 (1996). The court first notes that this case does not implicate a "legislative classification." In any event, defendants assert they merely sought to avail themselves of the appropriate judicial processes in order to enforce their rights. The court finds that defendants had a legitimate governmental interest in pursuing the state court action against plaintiffs D.L. and P.P. The right of access to the courts is "grounded in the Article IV Privileges and Immunities Clause, the First Amendment Petition Clause, the Fifth Amendment Due Process Clause, and the Fourteenth Amendment Equal Protection and Due Process Clauses." *Christopher v. Harbury*, 122 S.Ct. 2179, 2187, n.12 (2002). Further, plaintiffs make no factual allegations that defendants brought the lawsuit in bad faith, to harass plaintiffs, or for any other improper purpose. The court thus finds that defendants' decision to sue plaintiffs in state court bears a rational relationship to defendants' legitimate governmental interest in pursuing their right to seek judicial redress. Defendants' Motion for Summary Judgment is granted as to plaintiffs' substantive due process and equal protection claims.

E. State Tort Claims

Plaintiffs also bring a claim for invasion of privacy under state law. Defendants contend plaintiffs cannot bring this claim because they failed to comply with the notice requirements set out in the Kansas Tort Claims Act (KTCA), Kan.Stat.Ann.§ 75-6101 *et seq.* As set forth below, the court grants defendants' Motion for Summary Judgment as to plaintiffs' state law claims.

Plaintiffs' claim for invasion of privacy is subject to the KTCA. *Cf. Scheideman v. Shawnee County Bd. of County Comm'rs*, 895 F.Supp. 279, 282 (D. Kan. 1995). Kan.Stat.Ann. §12-105b requires that persons with tort claims give notice to a municipality before filing suit. Kan.Stat.Ann.§12-105b(d); *Johnson v. Bd. of County*

Comm'rs, 259 Kan. 305, 326, 913 P.2d 119, 134 (1996). Defendant U.S.D. # 497 is a "municipality" under the KTCA. Kan.Stat.Ann.§75-6102a(b). Section 12-105b(d) provides that "[a]ny person having a claim against a municipality which could give rise to an action brought under the Kansas tort claims act shall file a written notice as provided in this subsection before commencing such action." Kan. Stat. Ann. § 12-1056b(d).[21]

The notice requirements of §12-105b(d) are mandatory and are a condition precedent to bringing a tort claim against a municipality. *Tucking v. Bd. of Comm'rs,* 14 Kan.App.2d 442, 445, 796 P.2d 1055, 1057 (1990). Notice is required, both for claims against the municipality and for claims against individuals employed by the municipality who act within the scope of their employment. *King v. Pimentel,* 20 Kan.App.2d 579, 589, 890 P.2d 1217, 1225 (1995). Failure to comply with the notice requirements of § 12-105b(d) deprives the court of subject matter jurisdiction over tort claims raised against a municipality. *Scheideman,* 895 F.Supp. at 282. Therefore, plaintiffs here bear the burden to establish that each plaintiff who maintains a tort claim against the defendant municipality and its employees acting within the scope of their employment has complied with §12-105b(d)'s notice requirements.

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[21] Section 12-105b(d) specifies:
The notice shall be filed with the clerk or governing body of the municipality and shall contain the following: (1) The name and address of the claimant and the name and address of the claimant's attorney, if any; (2) a concise statement of the factual basis of the claim, including the date, time, place and circumstances of the act, omission or event complained of; (3) the name and address of any public officer or employee involved, if known; (4) a concise statement of the nature and the extent of the injury claimed to have been suffered; and (5) a statement of the amount of monetary damages that is being requested.
Id.

Plaintiffs have failed to demonstrate that they complied with the notice requirements set forth in the KTCA prior to bringing their claim for invasion of privacy. Accordingly, defendants' Motion for Summary Judgment as to plaintiffs' invasion of privacy claim is granted.

XII. Order

IT IS THEREFORE ORDERED THAT plaintiffs' Motion to Stay (Doc. 115) is denied as moot.

IT IS FURTHER ORDERED THAT defendants' Conditional Motion to Stay (Doc. 130) is denied.

IT IS FURTHER ORDERED THAT defendants' Motion to Dismiss Complaint (Doc. 66) is granted in part and denied in part.

IT IS FURTHER ORDERED THAT plaintiffs' Motion to File Supplement to Final Witness and Exhibit List (Doc. 165) is denied.

IT IS FURTHER ORDERED THAT defendants' Motion to Strike Certain Exhibits Submitted in Support of Plaintiffs' Motion for Partial Summary Judgment (Doc. 118) is granted in part and denied in part.

IT IS FURTHER ORDERED THAT defendants' Motion to Strike Affidavit of Cindy Harvel (Doc. 157) is denied.

IT IS FURTHER ORDERED THAT defendants' Motion to Strike and Preclude Testimony of Witnesses Not Previously Disclosed (Doc. 57) is granted in part and denied in part.

IT IS FURTHER ORDERED THAT plaintiffs' Motion to Exclude Expert Testimony (Doc. 155) is denied.

IT IS FURTHER ORDERED THAT defendants' Motion for Review of Magistrate's Decision on Defendants' Motion for Protective Order Regarding Plaintiffs' Rule 30(b)(6) Notice (Doc. 119) is denied.

IT IS FURTHER ORDERED THAT plaintiffs' Motion to Compel Answers to Plaintiffs' First Interrogatories and First Request for Production (Doc. 137) is granted.

IT IS FURTHER ORDERED THAT defendants' Application for Stay of Magistrate Judge's Order (Doc. 128) is denied.

IT IS FURTHER ORDERED THAT defendants' Motion for Summary Judgment (Doc. 90) is granted in part and denied in part.

IT IS FURTHER ORDERED THAT plaintiffs' Motion for Partial Summary Judgment (Doc. 107) is granted in part and denied in part.

In sum, the only claims that remain for trial are plaintiffs' IDEA claim against defendants U.S.D. # 497 and Eicher, and plaintiffs' procedural due process claim against defendant U.S.D. # 497.

S/CARLOS MURGUIA
United States District Judge

APPENDIX F – INDIVIDUAL WITH DISABILITIES IN EDUCATION ACT, 20 U.S.C. § 1415 "PROCEDURAL SAFEGUARDS"

(a) Establishment of procedures

Any State educational agency, State agency, or local educational agency that receives assistance under this subchapter shall establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies.

(b) Types of procedures

The procedures required by this section shall include—

(1) an opportunity for the parents of a child with a disability to examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(2) procedures to protect the rights of the child whenever the parents of the child are not known, the agency cannot, after reasonable efforts, locate the parents, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, the local educational agency, or any other agency that is involved in the education or care of the child) to act as a surrogate for the parents;

(3) written prior notice to the parents of the child whenever such agency—

(A) proposes to initiate or change; or

(B) refuses to initiate or change;

the identification, evaluation, or educational placement of the child, in accordance with subsection (c) of this section, or the provision of a free appropriate public education to the child;

(4) procedures designed to ensure that the notice required by paragraph (3) is in the native language of the parents, unless it clearly is not feasible to do so;

(5) an opportunity for mediation in accordance with subsection (e) of this section;

(6) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child;

(7) procedures that require the parent of a child with a disability, or the attorney representing the child, to provide notice (which shall remain confidential)—

(A) to the State educational agency or local educational agency, as the case may be, in the complaint filed under paragraph (6); and

(B) that shall include—

(i) the name of the child, the address of the residence of the child, and the name of the school the child is attending;

(ii) a description of the nature of the problem of the child relating to such proposed initiation or change, including facts relating to such problem; and

(iii) a proposed resolution of the problem to the extent known and available to the parents at the time; and

(8) procedures that require the State educational agency to develop a model form to assist parents in filing a complaint in accordance with paragraph (7).

(c) Content of prior written notice

The notice required by subsection (b)(3) of this section shall include—

(1) a description of the action proposed or refused by the agency;

(2) an explanation of why the agency proposes or refuses to take the action;

(3) a description of any other options that the agency considered and the reasons why those options were rejected;

(4) a description of each evaluation procedure, test, record, or report the agency used as a basis for the proposed or refused action;

(5) a description of any other factors that are relevant to the agency's proposal or refusal;

(6) a statement that the parents of a child with a disability have protection under the procedural safeguards of this subchapter and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained; and

(7) sources for parents to contact to obtain assistance in understanding the provisions of this subchapter.

(d) Procedural safeguards notice

(1) In general

A copy of the procedural safeguards available to the parents of a child with a disability shall be given to the parents, at a minimum—

(A) upon initial referral for evaluation;

(B) upon each notification of an individualized education program meeting and upon reevaluation of the child; and

(C) upon registration of a complaint under subsection (b)(6) of this section.

(2) Contents

The procedural safeguards notice shall include a full explanation of the procedural safeguards, written in the native language of the parents, unless it clearly is not feasible to do so, and written in an easily understandable manner, available under this section and under regulations promulgated by the Secretary relating to—

(A) independent educational evaluation;

(B) prior written notice;

(C) parental consent;

(D) access to educational records;

(E) opportunity to present complaints;

(F) the child's placement during pendency of due process proceedings;

(G) procedures for students who are subject to placement in an interim alternative educational setting;

(H) requirements for unilateral placement by parents of children in private schools at public expense;

(I) mediation;

(J) due process hearings, including requirements for disclosure of evaluation results and recommendations;

(K) State-level appeals (if applicable in that State);

(L) civil actions; and

(M) attorneys' fees.

(e) Mediation

(1) In general

Any State educational agency or local educational agency that receives assistance under this subchapter shall ensure that procedures are established and implemented to allow parties to disputes involving any matter described in subsection (b)(6) of this section to resolve such disputes through a mediation process which, at a minimum, shall be available whenever a hearing is requested under subsection (f) or (k) of this section.

(2) Requirements

Such procedures shall meet the following requirements:

(A) The procedures shall ensure that the mediation process—

(i) is voluntary on the part of the parties;

(ii) is not used to deny or delay a parent's right to a due process hearing under subsection (f) of this section, or to deny any other rights afforded under this subchapter; and

(iii) is conducted by a qualified and impartial mediator who is trained in effective mediation techniques.

(B) A local educational agency or a State agency may establish procedures to require parents who choose not to use the mediation process to meet, at a time and location convenient to the parents, with a disinterested party who is under contract with—

(i) a parent training and information center or community parent resource center in the State established under section 1482 or 1483 of this title; or

(ii) an appropriate alternative dispute resolution entity; to encourage the use, and explain the benefits, of the mediation process to the parents.

(C) The State shall maintain a list of individuals who are qualified mediators and knowledgeable in laws and regulations relating to the provision of special education and related services.

(D) The State shall bear the cost of the mediation process, including the costs of meetings described in subparagraph (B).

(E) Each session in the mediation process shall be scheduled in a timely manner and shall be held in a location that is convenient to the parties to the dispute.

(F) An agreement reached by the parties to the dispute in the mediation process shall be set forth in a written mediation agreement.

(G) Discussions that occur during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearings or civil proceedings and the parties to the mediation process may be required to sign a confidentiality pledge prior to the commencement of such process.

(f) Impartial due process hearing

(1) In general

Whenever a complaint has been received under subsection (b)(6) or (k) of this section, the parents involved in such complaint shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency.

(2) Disclosure of evaluations and recommendations

(A) In general

At least 5 business days prior to a hearing conducted pursuant to paragraph (1), each party shall disclose to all other parties all evaluations completed by that date and recommendations based on the offering party's evaluations that the party intends to use at the hearing.

(B) Failure to disclose

A hearing officer may bar any party that fails to comply with subparagraph (A) from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.

(3) Limitation on conduct of hearing

A hearing conducted pursuant to paragraph (1) may not be conducted by an employee of the State educational agency or the local educational agency involved in the education or care of the child.

(g) Appeal

If the hearing required by subsection (f) of this section is conducted by a local educational agency, any party aggrieved by the findings and decision rendered in such a hearing may appeal such findings and decision to the State educational agency. Such agency shall conduct an impartial review of such decision. The officer conducting such review shall make an independent decision upon completion of such review.

(h) Safeguards

Any party to a hearing conducted pursuant to subsection (f) or (k) of this section, or an appeal conducted pursuant to subsection (g) of this section, shall be accorded—

(1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;

(2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses;

(3) the right to a written, or, at the option of the parents, electronic verbatim record of such hearing; and

(4) the right to written, or, at the option of the parents, electronic findings of fact and decisions (which findings and decisions shall be made available to the public consistent with the requirements of section 1417 (c) of this title (relating to the confidentiality of data, information, and records) and shall also be transmitted to the advisory panel established pursuant to section 1412(a)(21) of this title).

(i) Administrative procedures

(1) In general

(A) Decision made in hearing

A decision made in a hearing conducted pursuant to subsection (f) or (k) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (g) of this section and paragraph (2) of this subsection.

(B) Decision made at appeal

A decision made under subsection (g) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Right to bring civil action

(A) In general

Any party aggrieved by the findings and decision made under subsection (f) or (k) of this section who does not have the right to an appeal under subsection (g) of this section, and any party aggrieved by the findings and decision under this subsection, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy.

(B) Additional requirements

In any action brought under this paragraph, the court—

(i) shall receive the records of the administrative proceedings;

(ii) shall hear additional evidence at the request of a party; and

(iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) Jurisdiction of district courts; attorneys' fees

(A) In general

The district courts of the United States shall have jurisdiction of actions brought under this section without regard to the amount in controversy.

(B) Award of attorneys' fees

In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents of a child with a disability who is the prevailing party.

(C) Determination of amount of attorneys' fees

Fees awarded under this paragraph shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this subsection.

(D) Prohibition of attorneys' fees and related costs for certain services

(i) Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under this section for services performed subsequent to the time of a written offer of settlement to a parent if—

(I) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than 10 days before the proceeding begins;

(II) the offer is not accepted within 10 days; and

(III) the court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.

(ii) Attorneys' fees may not be awarded relating to any meeting of the IEP Team unless such meeting is convened as a result of an administrative proceeding or judicial action, or, at the discretion of the State, for a mediation described in subsection (e) of this section that is conducted prior to the filing of a complaint under subsection (b)(6) or (k) of this section.

(E) Exception to prohibition on attorneys' fees and related costs

Notwithstanding subparagraph (D), an award of attorneys' fees and related costs may be made to a parent who is the prevailing party and who was substantially justified in rejecting the settlement offer.

(F) Reduction in amount of attorneys' fees

Except as provided in subparagraph (G), whenever the court finds that—

(i) the parent, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

(ii) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience;

(iii) the time spent and legal services furnished were excessive considering the nature of the action or proceeding; or

(iv) the attorney representing the parent did not provide to the school district the appropriate information in the due process complaint in accordance with subsection (b)(7) of this section; the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this section.

(G) Exception to reduction in amount of attorneys' fees

The provisions of subparagraph (F) shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of this section.

(j) Maintenance of current educational placement

Except as provided in subsection (k)(7) of this section, during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

(k) Placement in alternative educational setting

(1) Authority of school personnel

(A) School personnel under this section may order a change in the placement of a child with a disability—

(i) to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 school days (to the extent such alternatives would be applied to children without disabilities); and

(ii) to an appropriate interim alternative educational setting for the same amount of time that a child without a disability would be subject to discipline, but for not more than 45 days if—

(I) the child carries or possesses a weapon to or at school, on school premises, or to or at a school function under the jurisdiction of a State or a local educational agency; or

(II) the child knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance while at school or a school function under the jurisdiction of a State or local educational agency.

(B) Either before or not later than 10 days after taking a disciplinary action described in subparagraph (A)—

(i) if the local educational agency did not conduct a functional behavioral assessment and implement a behavioral intervention plan for such child before the behavior that resulted in the suspension described in subparagraph (A), the agency shall convene an IEP meeting to develop an assessment plan to address that behavior; or

(ii) if the child already has a behavioral intervention plan, the IEP Team shall review the plan and modify it, as necessary, to address the behavior.

(2) Authority of hearing officer

A hearing officer under this section may order a change in the placement of a child with a disability to an appropriate interim alternative educational setting for not more than 45 days if the hearing officer—

(A) determines that the public agency has demonstrated by substantial evidence that maintaining the current placement of such child is substantially likely to result in injury to the child or to others;

(B) considers the appropriateness of the child's current placement;

(C) considers whether the public agency has made reasonable efforts to minimize the risk of harm in the child's current placement, including the use of supplementary aids and services; and

(D) determines that the interim alternative educational setting meets the requirements of paragraph (3)(B).

(3) Determination of setting

(A) In general

The alternative educational setting described in paragraph (1)(A)(ii) shall be determined by the IEP Team.

(B) Additional requirements

Any interim alternative educational setting in which a child is placed under paragraph (1) or (2) shall—

(i) be selected so as to enable the child to continue to participate in the general curriculum, although in another setting, and to continue to receive those services and modifications, including those described in the child's current IEP, that will enable the child to meet the goals set out in that IEP; and

(ii) include services and modifications designed to address the behavior described in paragraph (1) or paragraph (2) so that it does not recur.

(4) Manifestation determination review

(A) In general

If a disciplinary action is contemplated as described in paragraph (1) or paragraph (2) for a behavior of a child with a disability described in either of those paragraphs, or if a disciplinary action involving a change of placement for more than 10 days is contemplated for a child with a disability who has engaged in other behavior that violated any rule or code of conduct of the local educational agency that applies to all children—

(i) not later than the date on which the decision to take that action is made, the parents shall be notified of that decision and of all procedural safeguards accorded under this section; and

(ii) immediately, if possible, but in no case later than 10 school days after the date on which the decision to take that action is made, a review shall be conducted of the relationship between the child's disability and the behavior subject to the disciplinary action.

(B) Individuals to carry out review

A review described in subparagraph (A) shall be conducted by the IEP Team and other qualified personnel.

(C) Conduct of review

In carrying out a review described in subparagraph (A), the IEP Team may determine that the behavior of the child was not a manifestation of such child's disability only if the IEP Team—

(i) first considers, in terms of the behavior subject to disciplinary action, all relevant information, including—

(I) evaluation and diagnostic results, including such results or other relevant information supplied by the parents of the child;

(II) observations of the child; and

(III) the child's IEP and placement; and

(ii) then determines that—

(I) in relationship to the behavior subject to disciplinary action, the child's IEP and placement were appropriate and the special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the child's IEP and placement;

(II) the child's disability did not impair the ability of the child to understand the impact and consequences of the behavior subject to disciplinary action; and

(III) the child's disability did not impair the ability of the child to control the behavior subject to disciplinary action.

(5) Determination that behavior was not manifestation of disability

(A) In general

If the result of the review described in paragraph (4) is a determination, consistent with paragraph (4)(C), that the behavior of the child with a disability was not a manifestation of the child's disability, the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner in which they would be applied to children without disabilities, except as provided in section 1412 (a)(1) of this title.

(B) Additional requirement

If the public agency initiates disciplinary procedures applicable to all children, the agency shall ensure that the special education and disciplinary records of the child with a disability are transmitted for consideration by the person or persons making the final determination regarding the disciplinary action.

(6) Parent appeal

(A) In general

(i) If the child's parent disagrees with a determination that the child's behavior was not a manifestation of the child's disability or with any decision regarding placement, the parent may request a hearing.

(ii) The State or local educational agency shall arrange for an expedited hearing in any case described in this subsection when requested by a parent.

(B) Review of decision

(i) In reviewing a decision with respect to the manifestation determination, the hearing officer shall determine whether the public agency has demonstrated that the child's behavior was not a manifestation of such child's disability consistent with the requirements of paragraph (4)(C).

(ii) In reviewing a decision under paragraph (1)(A)(ii) to place the child in an interim alternative educational setting, the hearing officer shall apply the standards set out in paragraph (2).

(7) Placement during appeals

(A) In general

When a parent requests a hearing regarding a disciplinary action described in paragraph (1)(A)(ii) or paragraph (2) to challenge the interim alternative educational setting or the manifestation determination, the child shall remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the time period provided for in paragraph (1)(A)(ii) or paragraph (2), whichever occurs first, unless the parent and the State or local educational agency agree otherwise.

(B) Current placement

If a child is placed in an interim alternative educational setting pursuant to paragraph (1)(A)(ii) or paragraph (2) and school personnel propose to change the child's placement after expiration of the interim alternative placement, during the pendency of any proceeding to challenge the proposed change in placement, the child shall remain in the current placement (the child's placement prior to the interim alternative educational setting), except as provided in subparagraph (C).

(C) Expedited hearing

(i) If school personnel maintain that it is dangerous for the child to be in the current placement (placement prior to removal to the interim alternative education setting) during the pendency of the due process proceedings, the local educational agency may request an expedited hearing.

(ii) In determining whether the child may be placed in the alternative educational setting or in another appropriate placement ordered by the hearing officer, the hearing officer shall apply the standards set out in paragraph (2).

(8) Protections for children not yet eligible for special education and related services

(A) In general

A child who has not been determined to be eligible for special education and related services under this subchapter and who has engaged in behavior that violated any rule or code of conduct of the local educational agency, including any behavior described in paragraph (1), may assert any of the protections provided for in this subchapter if the local educational agency had knowledge (as determined in accordance with this paragraph) that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.

(B) Basis of knowledge

A local educational agency shall be deemed to have knowledge that a child is a child with a disability if—

(i) the parent of the child has expressed concern in writing (unless the parent is illiterate or has a disability that prevents compliance with the requirements contained in this clause) to personnel of the appropriate educational agency that the child is in need of special education and related services;

(ii) the behavior or performance of the child demonstrates the need for such services;

(iii) the parent of the child has requested an evaluation of the child pursuant to section 1414 of this title; or

(iv) the teacher of the child, or other personnel of the local educational agency, has expressed concern about the behavior or performance of the child to the director of special education of such agency or to other personnel of the agency.

(C) Conditions that apply if no basis of knowledge

(i) In general If a local educational agency does not have knowledge that a child is a child with a disability (in accordance with subparagraph (B)) prior to taking disciplinary measures against the child, the child may be subjected to the same disciplinary measures as measures applied to children without disabilities who engaged in comparable behaviors consistent with clause (ii).

(ii) Limitations If a request is made for an evaluation of a child during the time period in which the child is subjected to disciplinary measures under paragraph (1) or (2), the evaluation shall be conducted in an expedited manner. If the child is determined to be a child with a disability, taking into consideration information from the evaluation conducted by the agency and information provided by the parents, the agency shall provide special education and related services in accordance with the provisions of this subchapter, except that, pending the results of the evaluation, the child shall remain in the educational placement determined by school authorities.

(9) Referral to and action by law enforcement and judicial authorities

(A) Nothing in this subchapter shall be construed to prohibit an agency from reporting a crime committed by a child with a disability to appropriate authorities or to prevent State law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability.

(B) An agency reporting a crime committed by a child with a disability shall ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom it reports the crime.

(10) Definitions

For purposes of this subsection, the following definitions apply:

(A) Controlled substance

The term "controlled substance" means a drug or other substance identified under schedules I, II, III, IV, or V in section 202(c) of the Controlled Substances Act (21 U.S.C. 812 (c)).

(B) Illegal drug

The term "illegal drug"—

(i) means a controlled substance; but

(ii) does not include such a substance that is legally possessed or used under the supervision of a licensed health-care professional or that is legally possessed or used under any other authority under that Act [21 U.S.C. 801 et seq.] or under any other provision of Federal law.

(C) Substantial evidence

The term "substantial evidence" means beyond a preponderance of the evidence.

(D) Weapon

The term "weapon" has the meaning given the term "dangerous weapon" under paragraph (2) of the first subsection (g) of section 930 of title 18.

(l) Rule of construction

Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 [42 U.S.C. 12101 et seq.], title V of the Rehabilitation Act of 1973 [29 U.S.C. 790 et seq.], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

(m) Transfer of parental rights at age of majority

(1) In general

A State that receives amounts from a grant under this subchapter may provide that, when a child with a disability reaches the age of majority under State law (except for a child with a disability who has been determined to be incompetent under State law)—

(A) the public agency shall provide any notice required by this section to both the individual and the parents;

(B) all other rights accorded to parents under this subchapter transfer to the child;

(C) the agency shall notify the individual and the parents of the transfer of rights; and

(D) all rights accorded to parents under this subchapter transfer to children who are incarcerated in an adult or juvenile Federal, State, or local correctional institution.

(2) Special rule

If, under State law, a child with a disability who has reached the age of majority under State law, who has not been determined to be incompetent, but who is determined not to have the ability to provide informed consent with respect to the educational program of the child, the State shall establish procedures for appointing the parent of the child, or if the parent is not available, another appropriate individual, to represent the educational interests of the child throughout the period of eligibility of the child under this subchapter.